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Supreme Court, U.S.
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No. 99-____

IN THE

Supreme Court of the United States

COMPETITION POLICY INSTITUTE,

Petitioner,

v.

U S WEST, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether rules promulgated by the Federal Communications Commission ("FCC") requiring local telephone companies to obtain affirmative customer consent before using or disclosing customer proprietary network information ("CPNI") restrict protected speech under the First Amendment.

2. Whether the court of appeals improperly rejected the governmental interest in protecting customers' privacy interests in their CPNI, given the specific congressional mandate for protecting the privacy of such data in Section 222 of the Communications Act of 1934, as amended, 47 U.S.C. § 222.

3. Whether *Chevron* deference is owed to administrative agencies on review of agency orders where the underlying statute presents a potential constitutional question.

LIST OF PARTIES AND AFFILIATES

Pursuant to Supreme Court Rule 29.6, Petitioner states as follows:

The Competition Policy Institute ("CPI") is an independent, non-profit organization that advocates state and federal policies to promote competition in telecommunications and energy services in ways that benefit consumers. CPI is advised by a board of consumer representatives from around the country and receives financial grants primarily from new entrants in the market for local telephone service. CPI has no parent companies, subsidiaries, or affiliates.

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PETITION FOR WRIT OF CERTIORARI

The Competition Policy Institute ("CPI") submits this petition for review of the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The initial order of the Tenth Circuit vacating the CPNI rules of the FCC issued August 18, 1999 in *U S West v. FCC*, 182 F.3d 1224 (10th Cir. 1999) (reprinted at Pet. App. 1a-54a). The court of appeals' order denying CPI's petition for rehearing was issued on November 30, 1999 and is reprinted at Pet. App. 90a-92a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The text of the First Amendment to the Constitution of the United States of America appears at Pet. App. 93a. The relevant portions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, appear at Pet. App. 94a-102a.

STATEMENT OF THE CASE

This case requires Court review in order to clarify the proper role of the federal courts of appeal in assessing rules promulgated by an administrative agency in accordance with its plenary jurisdiction granted by congressional statute. The court of appeals has misapplied the First Amendment to agency action that does not restrict speech. Further, the court has confused an Administrative Procedure Act challenge to agency rules with a *sub silentio* constitutional attack on a valid congressional statute, thereby obliterating Congress's judgment that personal privacy in today's "information age" requires that so-called Customer Proprietary Network Information ("CPNI") should not be used or disclosed without a person's approval. The court of appeals' decision raises core issues of separation of powers among the legislative, executive and judicial branches of the government and will have far-reaching consequences for judicial review of federal agency decisions. The court of appeals' judgment represents such a serious departure from the settled judicial role in administrative review that certiorari is warranted as an exercise of this Court's supervisory powers.

Section 222 — "Privacy of Customer Information"

The Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* (West Supp. 1998) (the "1996 Act"), is a sweeping legislative effort by Congress to create a "new model" of telecommunications regulation, H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. at 121, with the express purpose of "shift[ing] monopoly markets to competition as quickly as possible," H.R. Rep. No. 104-204, 104th Cong., 2d Sess. at 89. Included in the 1996 Act is Section 222, which enacts statutory restrictions on the use of CPNI — data regarding a customer's account and usage — by telecommunications carriers. 47 U.S.C. § 222 (Pet. App. at 95a-98a). Section 222 restricts both the disclosure of CPNI to third parties, *id.* § 222(c)(2) (Pet. App. at 95a), as well as the manner in which a carrier may use CPNI for provision and marketing of its own services, *id.* § 222(c)(1), (d) (Pet. App. at 96a). As with other provisions of the 1996 Act, the FCC is authorized to promulgate rules implementing Section 222 that further define and regulate use and disclosure of CPNI. 47 U.S.C. § 154(i) (Pet. App. at 94a). *See AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 730 (1999).

Section 222 provides that "every telecommunications carrier has a duty to protect the confidentiality of proprietary information of . . . customers." 47 U.S.C. § 222(a) (Pet. App. at 95a). In the 1996 Act, Congress established specific guidelines for permissible use of CPNI.[1] *Id.* § 222(c)(1)–(3)

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[1] The Act defines CPNI as "information that relates to the quantity, technical configuration, type, destination and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by

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(Pet. App. at 95a-96a). A telephone company may "use, disclose or permit access to individually identifiable [CPNI]" only in providing "the telecommunications service from which such information is derived" or "services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories." 47 U.S.C. § 222(c)(1) (Pet. App. at 95a). Most importantly, Section 222 provides that telephone companies must obtain customer "approval" prior to using CPNI for any purposes other than those expressly permitted. *Id.* § 222(c)(1), (c)(2), (d)(3) (Pet. App. at 95a-96a).

This framework — restricting use and disclosure of CPNI on an intra-service, or same-service, basis — represents Congress's resolution of the competing interests involved in CPNI. Congress sought to balance carriers' ability to compete in new services with customers' rights to prevent disclosure of sensitive information. As the House Conference Report makes clear, "the new section 222 strives to balance both competitive and consumer privacy interests with respect to CPNI." H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. at 205.

Agency Implementation of Section 222

Though Section 222 is a recent addition to the Communications Act, the FCC has regulated the use and disclosure of CPNI since prior to the divestiture of AT&T.[2] With the

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the customer solely by virtue of the carrier-customer relationship." 47 U.S.C. § 222(f)(1) (Pet. App. at 97a).

[2] In a series of decisions commonly referred to as *Computer II*, *Computer III*, *GTE ONA* and the *Bell Operating Company CPE Relief Orders*, the FCC created CPNI rules that were intended to prohibit

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passage of the 1996 Act, the FCC began a separate investigation of Congress's mandates in Section 222 in response to industry requests for guidance on the new provision. On May 17, 1996, the FCC released a *Notice of Proposed Rulemaking* requesting comment on which entities are bound by Section 222 and what constitutes customer "approval" for the use and disclosure of CPNI. After releasing an initial order and a request for additional public comment, the FCC issued its *Second Report and Order and Further Notice of Proposed Rulemaking* on February 26, 1998. *Implementation of the Telecommunications Act of 1996*, 13 FCC Rcd. 8061 (1998) ("*Second CPNI Order*") (Pet. App. at 55a-89a) (excerpts).

In the *Second CPNI Order*, the FCC adopted what it termed a "total service approach" to regulation of CPNI. 13 FCC Rcd. at 8081 (Pet. App. at 79a). Because Section 222 provides that a telecommunications carrier may use CPNI only "with the approval of the customer," the FCC interpreted the statute to mean that "approval" requires the affirmative, express consent of the customer prior to carrier use or disclosure of CPNI for purposes other than those expressly permitted. The FCC concluded that this framework "best protects customer privacy interests, while furthering fair competition, and thereby best comports with the statutory

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AT&T, and later the Bell Operating Companies ("BOCs") and GTE, from capitalizing on their incumbent status by using CPNI generated from traditional telephone service to gain a market foothold in newer telecommunications services, such as data transmission and voicemail. *See* 13 FCC Rcd. at 8069 n.31-32 (Pet. App. at 64a-65a) (collecting citations). These rules restricted AT&T and the BOCs from using telephone service-generated CPNI to target existing telephone customers for unsolicited marketing regarding new telecommunications services. These pre-Section 222 CPNI restrictions remain in effect.

language, history and structure of section 222." 13 FCC Rcd. at 8084 (Pet. App. at 79a).

The FCC considered and rejected an "opt-out" approach, under which there would be a presumption of customer consent unless the customer expressly acted, after carrier notice, to block use of CPNI. *Second CPNI Order*, 13 FCC Rcd. at 8128 (Pet. App. at 82a-86a). The agency reasoned that the statutory bar against use or disclosure of private customer information absent "customer approval" warranted a rule that permits customers to restrict use of CPNI at their option. *Id.* at 8131 (Pet. App. at 86a-87a). Further, the Commission found that customers "may be unaware of the privacy protections afforded by section 222, and may not understand that they must take affirmative steps to restrict access to sensitive information." *Id.* Thus, the FCC concluded that "it [is] difficult to construe a customer's failure to respond to a notice as constituting an informed approval of its contents," and accordingly adopted "a mechanism of express approval." *Id.*

The Court of Appeals' Decision

U S West filed a petition for review of the *Second CPNI Order* on May 18, 1998, contending that the FCC's "opt-in" rules violate the First and Fifth Amendments to the Constitution. Claiming that restrictions on CPNI interfered with its right to engage in targeted direct marketing to its customers, U S West argued that CPNI is protected constitutional speech and that the agency's rules did not meet the "commercial speech" requirements of *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York,* 447 U.S. 557 (1980). According to U S West, the "practical impact" of the CPNI rules is to prevent speaking to

customers "on an individualized basis," an action tantamount to a restriction on speech altogether. 182 F.3d at 1243 (Pet. App. at 42a). *See* U S West Reply Br. at 6.

Without addressing this purported "practical impact" of the FCC's rules, the court of appeals vacated the *Second CPNI Order* in a 2-1 decision. The majority opinion assumes, with little analysis, that the CPNI rules interfere with constitutionally protected speech. Analogizing to *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), where this Court overturned a statute barring targeted direct mail by personal injury attorneys, the court held that the CPNI rules are a restriction on "targeted speech." The court of appeals did not reach the Fifth Amendment issue. Judge Briscoe, in dissent, wrote that the court's analysis is "frustratingly vague" because the *Second CPNI Order* "does not . . . directly impact a carrier's expressive activity." 182 F.3d at 1244 (Pet. App. at 44a).

The court of appeals vacated the *Second CPNI Order* on the theory that the privacy interest relied on by the FCC is not, standing alone, a substantial state interest that satisfies the *Central Hudson* standard for restrictions on commercial speech. The court concluded that "[n]either Congress nor the FCC explicitly stated what 'privacy' harm § 222 seeks to protect against." *Id.* at 1235 (Pet. App. at 21a). Further, the court expressed "doubts about whether this interest, as presented, rises to the level of 'substantial'" under *Central Hudson*. *Id.* (Pet. App. at 21a-22a).

The majority reasoned that the agency was required to provide "empirical explanation and justification" showing that "dissemination of the information desired to be kept private would inflict specific and significant harm on individu-

als." 182 F.3d at 1235 (Pet. App. at 22a). Finding that the FCC "fail[ed] to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy," *id.* at 1238 (Pet. App. at 34a), the majority held that the CPNI Order is not "narrowly tailored" to protect customer privacy. The majority refused to apply *Chevron* deference[3] to the agency's construction of Section 222 because, in its view, such deference is inappropriate when the agency interpretation "raises serious constitutional questions." 182 F.3d at 1231 (Pet. App. at 14a) (citing *Williams v. Babbitt,* 115 F.3d 657, 661-62 (9th Cir. 1997)).

Judge Briscoe's dissent argued that where a statute is silent or ambiguous, as Section 222 is on what form of "approval" must be provided for carrier use of CPNI, courts should defer to the agency's interpretation where it is a reasonable construction of the statute. 182 F.3d at 1241-42 (Pet. App. at 36a-37a). She reasoned that U S West's arguments were "aimed at the restrictions and requirements outlined in § 222 rather than the approval method adopted in the CPNI Order." *Id.* at 1243 (Pet. App. at 42a). Judge Briscoe concluded that the CPNI rules do not affect speech because they "simply adopt[] from an extremely limited range of choices the particular method a carrier must use in obtaining customer approval." *Id.* at 1243 (Pet. App. at 43a). Finally, Judge Briscoe criticized the majority's rejection of the FCC's privacy rationale because

> The privacy interest did not originate with the FCC or the CPNI Order; rather, it originated with Congress

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[3] *Chevron U.S.A., Inc. v Natural Resources Defense Council,* 467 U.S. 837 (1984).

> when it enacted the restrictions outlined in § 222. Precisely how the FCC could have or, for that matter, why it would have included in the administrative record "more empirical explanation and justification" for an interest that originated with Congress, and thus predated the administrative process in this case, is unclear. As an administrative agency, and not an independent branch of government, the FCC was obligated to implement without question Congress' directive to require some form of customer approval.

182 F.3d at 1245 (Pet. App. at 46a-47a).

The full court of appeals, by a 6-5 vote, denied CPI's petition for *en banc* rehearing on November 30, 1999 without opinion. (Pet. App. at 90a-92a).

SUMMARY OF ARGUMENT

The court of appeals' decision is a dangerous departure from settled rules of statutory construction and the proper role of federal courts in assessing the constitutionality of agency rules. An "opt-in" requirement for customer approval for use of CPNI is not the First Amendment equivalent to a direct ban on communication with customers. CPNI is data, not speech, and the FCC's CPNI rules do not restrict or prohibit any communication in which a telephone company may desire to engage with any customer. Unlike the prohibitions on direct customer solicitation that this Court has invalidated, the FCC's CPNI rules, at most, marginally increase the cost of "targeted marketing" by regulating the use of CPNI as a source of mailing lists. The court of appeals' implicit assumption that an "opt-in" rule

makes targeted commercial speech economically impossible is completely unsupported.

Addressing the governmental interest in customer privacy in the context of the FCC's rules is in any event improper, because the nature and sufficiency of that interest are relevant only to the constitutionality of the 1996 Act itself, a matter not challenged in this case. Both an "opt-in" and "opt-out" method would obviously affect some speech. Thus, the court of appeals used judicial review of agency action to collaterally attack the constitutionality of the statute itself, an impermissible exercise of judicial power that threatens the function of administrative agencies in implementing congressionally established public policies. Further, in assessing the applicability of customers' privacy interests, the court of appeals incorrectly applied a "least restrictive means" test to the FCC's regulations, contravening the more liberal standard for limitation of commercial speech under *Central Hudson.*

Finally, the court of appeals has erroneously imposed its own view of the relative merits of the different means of implementing Section 222 by rejecting the agency's reasonable interpretation that customer "approval" requires affirmative, "opt-in" consent. This conflicts with the *Chevron* deference due the agency and contradicts the FCC's rulemaking authority under the 1996 Act recently confirmed by this Court in *AT&T Corp. v. Iowa Utilities Board,* 119 S. Ct. 721 (1999). Individually and collectively, these are compelling reasons why this Court should grant certiorari in order to examine, on the merits, the court of appeals' ruling on the profoundly important privacy questions raised in this case.

REASONS FOR ISSUING THE WRIT

I. THE COURT OF APPEALS' JUDGMENT IMPERMISSIBLY EXPANDS FIRST AMENDMENT PRINCIPLES TO OVERRULE RESTRICTIONS ON THE COMMERCIAL USE OF PERSONAL DATA THAT DO NOT DIRECTLY OR INDIRECTLY PROHIBIT SPEECH

The court of appeals' judgment is a highly troubling departure from settled standards of assessing commercial speech restrictions. First, the court treated the CPNI rules as a prohibition on speech, when in fact the FCC's regulations merely implement a statutory bar against commercial use of personal telecommunications data without customer consent. Second, the court improperly rejected congressional findings that such personal data warrants privacy protection and required the government to meet a First Amendment "strict scrutiny" standard inapplicable to commercial speech cases.

A. CPNI Is Data, Not Expression, That Is Not Constitutionally Protected

The First Amendment infirmity that the court of appeals purported to find in the FCC's "opt-in" CPNI rules is ephemeral. The limitations on the use of CPNI adopted in the *Second CPNI Order* are not directed at the content of communications with customers and do not prohibit, regulate or restrict any marketing communication by any telecommunications carrier.

Contrary to the court of appeals' analysis, CPNI itself is not speech, but rather data. Consistent with Section 222, the FCC defines CPNI as information about a customer's use of telecommunications "that is made available by the customer

solely by virtue of the customer-carrier relationship." 47 C.F.R. § 64.2003(c). CPNI includes data regarding "to whom, where and when a customer places a call, as well as the types of service offerings to which the customer subscribes and the extent the service is used." *Second CPNI Order*, 13 FCC Rcd. at 8064 (Pet. App. at 57a). Although this information is an ingredient that may be useful to focus marketing communications on a target audience, it is not, by itself, constitutionally protected speech. The issue in this case is only how CPNI can be used as the criteria by which telephone companies select customers and potential customers to receive their marketing communications. Importantly, the court of appeals did *not* hold that the FCC's rules restrict the *publication* of CPNI itself.

CPNI is a source of data that can be used in developing carrier marketing campaigns targeting specific customers. The FCC's regulations merely prevent carriers from using this data to market unrelated services — those services not "necessary to or used in" a customer's existing communications services — without the affirmative consent of the customer. 47 U.S.C. § 222(c)(1) (Pet. App. at 95a). The CPNI rules do not prohibit any customer solicitations, but instead only affect the information that can be used to determine the audience to be solicited. While the data comprising CPNI may express some of the commercial attributes of telecommunications customers, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes . . . [and] such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

The FCC's CPNI rules do not restrict, let alone ban, any commercial speech. As Judge Briscoe's dissent below explains, the agency's choice of an "opt-in" rule for obtaining customer consent for use of telephone usage data does not "directly impact a carrier's expressive activity (by, for example, limiting the manner in which the carrier can speak), nor does it indirectly impact a carrier's expressive activity in such a manner as to warrant First Amendment scrutiny." 182 F.3d at 1244 (Pet. App. at 47a-48a). Indeed, respondent U S West conceded that it was really arguing that the practical impact of the CPNI rules is only to prevent speaking to customers "on an individualized basis," which does not prevent speech entirely but may make it less effective for targeted marketing purposes. 182 F.3d at 1243 (Pet. App. at 41a).

The court of appeals' opinion never comes to grips with this important distinction. It is true that indirect burdens on protected speech can be constitutionally significant in some circumstances. The Tenth Circuit's analysis, however, fails to differentiate between a direct speech restriction and the indirect economic effect, as claimed here, of a rule that may increase the cost of "individualized or customized" speech. These indirect economic impacts are not only questionable — there is no support in the record for the proposition that all targeted marketing communication is economically impractical absent use of CPNI — but have been recognized by this Court only where the restriction is an overriding deterrent to all speech. *See, e.g., United States v. NTEU,* 513 U.S. 454, 469 (1995) (ban on honoraria); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board,* 502 U.S. 105 (1991) (ban on compensating criminals in publishing deals).

The court of appeals appears to have assumed, without analysis, that the impact of the CPNI rules is so significant that, for constitutional purposes, they should be treated as a restriction on speech even though the rules allow U S West to engage in any speech it wants, to whatever audience it chooses. While the First Amendment "protects [the speakers'] right not only to advocate their cause but also to select what they believe is the most appropriate means for so doing," *Meyer v. Grant,* 486 U.S. 414, 424 (1988), the CPNI rules do not prohibit carriers from selecting the means of engaging in commercial speech. For instance, nothing precludes U S West and other telephone companies from using other sources of information (mailing lists, consumer market research, etc.) to "target" its marketing speech to a customized audience. Whether or not the purported economic impact of its inability to use CPNI as the basis for marketing campaigns rises to a level sufficient to warrant constitutional scrutiny is at best questionable and, in any event, remains unaddressed in the court of appeals' decision.[4]

Thus, this case substantially differs from the commercial speech decisions relied on by respondent and the court of appeals. Contrary to the court's citation of *Florida Bar v. Went for It, Inc.,* 515 U.S. 618 (1995), this case does not involve any direct ban on "targeted" speech. In *Went For It* and similar cases, the courts were examining rules that prohibited speech itself. For instance, the Florida Bar rule in *Went For It* made direct mail advertisements to accident vic-

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[4] *See, e.g.,*182 F.3d at 1232 (Pet. App. at 13a) ("The existence of alternative channels of communication, such as broadcast speech, does not eliminate the fact that the CPNI regulations restrict speech.").

tims unlawful. *Id.* at 620-21. Similarly, *Martin v. Struthers*, 319 U.S. 141 (1943), *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), *Schneider v. State*, 308 U.S. 147 (1939), and *Edenfield v. Fane,* 507 U.S 761 (1993), all involved outright prohibitions on direct or in-person solicitations. Each of these cases invalidated regulations that prevented solicitation of customers. In contrast, the *Second CPNI Order* does not prevent soliciting customers; it eliminates one method of gathering information to determine which customers to solicit.

The speech constraint U S West complains of is no more than a restriction on telecommunications carriers' ability to presume that a customer consents to using his personal information when the carrier cannot or has not obtained express consent from that customer. The First Amendment does not require that a customer's consent be assumed. Indeed, such a result impermissibly impairs an individual's ability to assert his privacy rights guaranteed under the Constitution. "[W]e have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).[5] When

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[5] Similarly, there is no impermissible abridgement of the right to receive information in the *Second CPNI Order*. The First Amendment "necessarily protects the right to receive" information. *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972). The *Second CPNI Order* allows the customer to receive information by giving his affirmative consent. Such a slight effect on the rights of a listener is clearly constitutional. This Court has recognized the strong government interest in certain forms of economic regulation, even though such regulations may have an incidental effect on rights of speech and association. *National*

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Congress enacted Section 222, it protected customers from just this sort of unwanted speech associated with telecommunications carriers using CPNI for marketing purposes.

> [W]e have been careful to acknowledge that unwilling listeners may be protected when in their own homes. In *Schneider*, for example, in striking down a complete ban on handbilling, we spoke of a right to distribute literature only "to one willing to receive it." Similarly, when we invalidated a ban on door-to-door solicitation in *Martin*, we did so on the basis that the "home owner could protect himself from such intrusion by an appropriate sign 'that he is unwilling to be disturbed.'"

Frisby, 487 U.S. at 485 (1988) (internal citations omitted).

Section 222, and the FCC's implementing "opt-in" rule for customer approval, are thus a valid exercise of government authority to protect against unwanted use of private data. The FCC's CPNI restrictions are similar to efforts of homeowners to curtail door-to-door solicitation — empowering customers to prevent unwanted commercial solicitation via targeted marketing. Regulation in this area is thus entirely appropriate, because the government may "prohibit speech when a 'captive' audience cannot avoid" it. *Frisby*, 487 U.S. at 487. As further discussed in the next section, even if the CPNI rules did restrict commercial speech, the FCC's *Second CPNI Order* is completely consistent with this Court's settled commercial speech precedents.

Association for the Advancement of Colored People, et. al., v. Claiborne, 458 U.S. 886, 912 (1982).

B. The FCC's "Opt-In" Approach Is Plainly a "Reasonable" Means of Protecting Consumer Privacy Interests

Commercial speech doctrine requires the government to have a "substantial interest" in regulating the affected speech and to fashion regulations that "materially advance" that interest. *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Even if CPNI itself were considered speech for First Amendment purposes, the court of appeals below strayed from proper commercial speech analysis in rejecting the sufficiency of the governmental interest in telecommunications privacy and in requiring the FCC to meet a "least restrictive means" standard inapplicable in commercial speech cases.

First, the court of appeals held that the governmental interest in protecting telephone customer privacy is insufficient to qualify as a "substantial" interest for purposes of First Amendment commercial speech analysis.[6] The flaw in this approach is that the privacy interest in CPNI was established by Congress in enacting Section 222, not by the FCC in deciding how to implement that statute's command for customer "approval." Whether an "opt-in" or "opt-out" approach is permissible under the 1996 Act is a question completely unrelated to whether customer privacy is a constitutionally sufficient governmental interest under the *Central Hudson* First Amendment test. More importantly, it

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[6] "Neither Congress nor the FCC explicitly stated what 'privacy' harm § 222 seeks to protect against." 182 F.3d. at 1235 (Pet App. at 21a). Further, the court expressed "doubts about whether this interest, as presented, rises to the level of 'substantial'" under *Central Hudson*. *Id.*

is settled that "[p]rotection of potential clients' privacy is a substantial state interest." *Edenfield v. Fane,* 507 U.S. at 769. Thus, the *Second CPNI Order* regulates only matter in which the government clearly has a substantial interest.

Second, the question of "opt-in" versus "opt-out" as a means of implementing Section 222 is not a matter of constitutional significance. Both place requirements on carriers that must be met before CPNI is used or disclosed. Both increase the cost of engaging in the "targeted speech" of which respondent complains here. And as discussed in Section II below, both would be permissible interpretations of the "approval" proviso in the statute.

Third, and most significantly, in deciding whether the FCC's *Second CPNI Order* "materially advances" the governmental interest in customer privacy, the court of appeals erroneously required the FCC to demonstrate that its CPNI rules were the least restrictive alternative for regulating CPNI. The Tenth Circuit held that the FCC had "fail[ed] to adequately consider an obvious and substantially less restrictive alternative," the "opt-in" method. 182 F.3d at 1238 (Pet App. at 30a). But the FCC in fact expressly evaluated the relative merits of the opt-out alternative.[7]

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[7] The FCC concluded that "imposing an express approval requirement provides superior protection for privacy interests because, unlike under the opt-out approach, when customers must affirmatively act before their CPNI is used or disclosed, the confidentiality of CPNI is preserved until the customer is actually informed of its statutory protections." *Second CPNI Order*, 13 FCC Rcd. at 8133 (Pet App. at 87a).

Further, it is settled that the "'least restrictive means' test has no role in the commercial speech context." *Florida Bar v. Went for It*, 515 U.S. 618, 632 (1995). As this Court explained in *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989), in commercial speech cases the fit between the restrictions and the governmental interest does not need to be "perfect, but reasonable." A commercial speech regulation "can, in fact, be more extensive than is necessary to serve the government's interest as long as it is not unreasonably so. This intermediate level of scrutiny is a far cry from strict scrutiny, under which the government interest must be 'compelling' and the regulation 'narrowly tailored' to serve that interest." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 434 (1993) (Blackmun, J., concurring).

There is no legitimate question that the FCC's opt-in scheme for implementing Section 222 is a "reasonable" means of effectuating the clearly substantial governmental interest in protecting the privacy of customer telecommunications usage information. Instead, by attacking the privacy basis for CPNI protections and applying strict scrutiny to the FCC's implementation of that congressionally mandated policy, the court of appeals below has "stray[ed] from the narrow scope of the *CPNI Order* and effectively take[n] into account the statutory restrictions on CPNI usage." 182 F.3d at 1244 (Briscoe, J., dissenting) (Pet. App. at 44a). Therefore, the court of appeals' decision to vacate the *Second CPNI Order* must be reversed.

II. THE COURT OF APPEALS' DECISION CONTRAVENES SEPARATION OF POWERS BY SUBSTITUTING JUDICIAL POLICY JUDGMENTS FOR AGENCY RESPONSIBILITY IN STATUTORY INTERPRETATION

Well-settled principles of administrative law dictate that when Congress enacts legislation and a federal agency promulgates rules pursuant to that legislation, federal courts are to presume the validity of the agency's judgment. *Chevron U.S.A, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). This presumption carries the day unless the agency has acted contrary to the expressed will of Congress or has violated rights secured by the Constitution. *Rust v. Sullivan*, 500 U.S. 173, 190 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

In this case, the court of appeals refused to exercise the requisite *Chevron* deference, relying instead on its own uninformed policy determinations and constitutional concerns to vacate the agency's rules. This arrogation of power cannot be squared with well-established administrative law, Article III limitations on the role of the judiciary vis-a-vis the executive, or this Court's recogniton of the FCC's plenary rulemaking powers under the 1996 Act.

A. The FCC's *Second CPNI Order* Raises No Grave Constitutional Issues Warranting Departure from Chevron Deference to Administrative Interpretation

This Court's landmark *Chevron* decision provides a clear standard for reviewing agency interpretations of ambiguous statutes:

> [I]f the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43.

A federal agency's entitlement to judicial deference on review may be limited only when "grave and doubtful constitutional questions" are raised by agency action. *United States ex rel. Hudson v. Delaware & Hudson Co.*, 213 U.S. 366, 408. *Accord*, *Rust v. Sullivan*, 500 U.S. at 191; *DeBartolo*, 485 U.S. at 575; *Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1795 (1998). Thus, not any merely colorable claim as to the constitutionality of a regulation will strip an agency of *Chevron* deference. Rather, courts "limit this intrusion on agency power to situations where it's absolutely necessary." *Babbitt*, 115 F.3d at 662.

Where an act of Congress necessarily touches constitutional concerns, reasoned agency judgment weighing equally rational policy alternatives must not be displaced.[8] For example, in *Rust*, this Court evaluated Department of Health and Human Services regulations prohibiting federally funded

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[8] "If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it." *United States v. Shimer*, 367 U.S. 374, 383 (1961).

entities from advocating abortion as a method of family planning. The Court, bound by its earlier decision in *Roe v. Wade*, 410 U.S. 113 (1973), recognized that "any set of regulations promulgated by the Secretary [of the Department] . . . would be challenged on constitutional grounds." 500 U.S. at 191. According deference to the Secretary's policy determination, however, the Court found that his action did not, as against other possible actions, "raise the sort of 'grave and doubtful constitutional questions' that would lead us to assume Congress did not intend to authorize their issuance." *Id.*

Thus, agencies are not precluded from exercising their regulatory discretion when an act of Congress, although raising possible constitutional issues, requires agencies to interpret and enforce its provisions. Here, however, the court of appeals failed to apply this principle of judicial restraint, holding that the mere existence of a constitutional question was sufficient to justify a *de novo* standard of judicial review and accord no deference to the findings or reasoning of the agency. 182 F.3d at 1231 (Pet. App. at 11a). This misapplication of constitutional sensitivity resulted in the court's vacating the *Second CPNI Order* on the basis of its own policy judgment, thereby encroaching upon the power of the executive branch to adopt regulatory policy within its statutory authority.

The *Second CPNI Order* does not raise "grave and doubtful constitutional questions" that support *de novo* review of the FCC's decision. Assuming CPNI is "speech," the lack of a definition in Section 222 compelled the FCC to decide whether "approval of the customer" requires affirmative, "opt-in" consent or passive, "opt-out" rejection. There is no question that, under *Chevron,* the FCC's

interpretation would be entitled to judicial deference in the absence of a constitutional challenge, because without any statutory definition of "approval," the legislation is manifestly ambiguous. Having before it a statutory requirement for customer approval for use or disclosure of CPNI, the FCC was required to fashion some mechanism to implement the "approval" standard in practice.

Even if the court of appeals' First Amendment concerns were relevant to the FCC's rules (as opposed to the underlying statute), they are makeweight, for the reasons explained in detail above. Consequently, by construing *DeBartolo* to override *Chevron* whenever a possible constitutional issue lurks in judicial review of agency rulemakings, the court of appeals assumed the role of policy maker. The court of appeals reasoned that the "the FCC still insufficiently justified its choice to adopt an opt-in regime," 182 F.3d at 1240 (Pet. App. at 33a), solely because the court believed that the opt-out alternative was preferable in terms of protecting carriers' commercial speech interests. But neither the statute, nor the FCC's rules, present "grave and doubtful constitutional questions" under this Court's commercial speech jurisprudence. Without the necessary constitutional predicate, the court of appeals' judgment is simply the court's imposition of its own view on proper public policy in lieu of those of the expert agency charged by Congress with regulating telecommunications. Long-standing precedent prohibits this kind of judicial encroachment upon the discretion of administrative agencies. *Chevron*, 467 U.S. at 844; *United States v. Shimer*, 367 U.S. 372, 382 (1961).

As this Court has recognized, Congress has intentionally relied upon this administrative expertise, endowing the FCC with plenary jurisdiction to regulate telecommunications un-

der the Communications Act of 1934[9] and again in the 1996 Act. In *Iowa Utilities Board,* the Court reiterated that the FCC has broad authority to implement the Act's terms and make congressional policy a reality. *Iowa Utils. Bd.*, 119 S. Ct. at 730 ("the grant in § 201 [of the Act] means what it says: The FCC has rulemaking authority to carry out 'the provisions of this Act.'"). Given this broad agency jurisdiction over today's complex telecommunications industry, and the absence of any "grave" constitutional issue, the court of appeals' rejection of *Chevron* deference is a very unsettling departure from appropriate bounds of limited judicial review that warrants this Court's consideration on the merits.

B. Federal Courts May Not Apply Concerns of Constitutionality to Quite Different Concerns Regarding Agency Implementation

The court of appeals' reasoning calls into question the judgment of Congress, not the FCC. U S West sought review of the FCC's *Second CPNI Order* pursuant to Section 402(a) of the Communications Act, 47 U.S.C. § 402(a), on grounds that the FCC's rules violated the First and Fifth Amendments to the Constitution. 182 F.3d at 1231 (Pet. App. at 8a). Nowhere in the proceedings below was the validity of the underlying provisions of Section 222 addressed or questioned, as the majority acknowledges. *Id.* Nonetheless, the gravamen of the majority's conclusion rests

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[9] *E.g., Capital Cities Cable v. Crisp*, 467 U.S. 691, 699-700 (1984) ("the Court [has] found that that Commission had been given 'broad responsibilities' to regulate all aspects of interstate communication by wire or radio by virtue of section 2(a) of the Communications Act of 1934").

squarely on an attack on the congressional statute and the policy underpinnings of its language.[10]

Addressing only the First Amendment issue, the court of appeals conducted its analysis under *Central Hudson* with a heavy-handed suspicion of the validity of Congress's motivation in enacting Section 222. First, the court second-guessed the privacy interest at stake in Section 222, noting dubiously that "the breadth of the concept of privacy requires us to pay particular attention to attempts by the government to assert privacy as a substantial state interest." 182 F.3d at 1234 (Pet. App. at 18a). The court then found that "[n]either Congress nor the FCC explicitly stated what 'privacy' harm § 222 seeks to protect against." 182 F.3d at 1235 (Pet. App. at 21a). As Judge Briscoe correctly observed in dissent, this statement reveals the majority's clear animus toward Section 222 itself, and not the FCC's subsequent rules. 182 F.3d at 1244 (Pet. App. at 44a).

In collaterally attacking the constitutionality of Section 222, the court of appeals purported to follow the old canon first articulated in *Hooper v. California*, 155 U.S. 648, 657 (1895), that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." 182 F.3d at 1231 (Pet. App. at 9a-10a). Indeed, federal courts are required to avoid deciding cases on constitutional grounds where a statutory holding is sufficient to dispose of the

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[10] As Judge Briscoe aptly noted in dissent, "[i]t is difficult to tell from the majority's opinion where its analysis of the CPNI Order ends and its analysis of the statute begins. For much of the opinion, the majority appears to be reviewing the constitutionality of § 222 rather than the CPNI Order." 182 F.3d at 1244 n.6 (Pet. App. at 44a).

matter. *Rust*, 500 U.S. at 191 (citation omitted). In reaching out to decide the First Amendment question based on an invalid rejection of administrative agency discretion in resolving statutory ambiguities, the court of appeals has established a new and risky role for courts, one that can easily lead to the inadvertent creation of judge-made rights in the context of judicial review of administrative action. As Judge Posner has written,

> [t]he practical effect of interpreting statutes to avoid raising constitutional questions is therefore to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution — to create a judge-made constitutional 'penumbra' that has much the same prohibitory effect as the judge-made (or at least amplified) Constitution itself. And we do not need that.[11]

The court of appeals' conclusion that it was required to pay "particular attention" to the validity of the privacy considerations underlying Section 222 and the FCC's CPNI rules is misplaced. Congress's intent to protect consumer privacy in the midst of the exploding information age is unmistakable. Not only does Section 222 impose privacy obligations on telecommunications carriers, but Section 631, 47 U.S.C. § 551, requires cable operators to inform all subscribers upon commencing service that the operator will collect "personally identifiable information" about the subscriber and to explain the parameters for "the nature,

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[11] Richard A. Posner, *Statutory Interpretation – In The Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 816 (1983).

frequency, and purpose of any disclosure" of the information. 47 U.S.C. § 551(a)(1) (Pet. App. at 99a). Congress's interest in privacy thus pervades communications and is evident a variety of existing and proposed legislation.[12]

Moreover, this Court's decisions require federal courts to defer to congressional legislative judgments even if a particular statute raises potential constitutional concerns. In *Turner Broadcasting v. FCC*, 520 U.S. 180 (1997), the Court reviewed Congress's "must-carry" provisions included in the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534-535, under the First Amendment. Despite the clear effect of those provisions — federally compelled speech imposed on cable providers — the Court gave deference to Congress, both in its factual findings and policy judgment in support of must-carry rules. 520 U.S. at 195-96. The Court found that "[e]ven in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when en-

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[12] See, e.g., Child Online Privacy Protection Act, 15 U.S.C. 6501 (1998). Congress's continued interest in protecting consumer privacy is evidenced in several pending legislative initiatives: H.R. 313, 106th Cong. 1st Sess. (1999); H.R. 367, 106th Cong. 1st Sess. (1999); H.R. 514, 106th Cong. 1st Sess. (1999); H.R. 1057, 106th Cong. 1st Sess. (1999); H.R. 1910, 106th Cong. 1st Sess. (1999); S. 759, 106th Cong. 1st Sess. (1999); S. 573, 106th Cong. 1st Sess. (1999); S. 854, 106th Cong. 1st Sess. (1999).

acting nationwide regulatory policy." 520 U.S at 196.[13] Thus, the court of appeals plainly encroached upon Congress's power rejecting, for its own reasons, the "'privacy' harm § 222 seeks to protect against." 182 F.3d at 1234 (Pet. App. at 21a).

In sum, the court of appeals seriously erred by confusing its constitutional reservations about Section 222 with the validity of the FCC's *Second CPNI Order*. When presented with constitutional infirmities in a statute, federal courts must address those issues directly and should not clothe qualms about a statute's constitutionality in the garb of Administrative Procedure Act review. Federal courts are bound to presume that Congress acted within the bounds of the Constitution and must not "lightly assume that Congress intended to infringe constitutionally protected liberties or usurp the power constitutionally forbidden it." *DeBartolo*, 485 U.S. at 575. The court of appeals here has demonstrated a marked and improper indifference to Congress's express policy judgments, running roughshod over powers of the legislature.

The court of appeals' decision below is thus either a disregard of Congress's expressed intent or the *sub silentio* judicial repeal of a federal statute. Even if they were based on valid public policy, either of these explanations raises grave separation of powers implications, for each represents improper judicial intrusion into the law-making province of Congress.

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[13] *See also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 365 (1985) (courts must defer to Congress's judgment when Fifth Amendment due process concerns arise out of a statute).

CONCLUSION

For all these reasons, the writ of certiorari should be granted.

Respectfully submitted,

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February 28, 2000

No. 99-___

IN THE

Supreme Court of the United States

COMPETITION POLICY INSTITUTE,

Petitioner,

v.

U S WEST, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S APPENDIX

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U.S. WEST, INC., Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, and United States of America, Respondents, Airtouch Communications, Inc. (Airtouch); Sprint Corporation; AT & T Corporation; SBC Communications, Inc. (Sbc); Southwestern Bell Telephone Company; Pacific Bell; Nevada Bell; MCI Telecommunications Corporation; Competitive Telecommunications Association; Competition Policy Institute; Bellsouth Corporation; Frontier Corporation, Intervenors,

and

Information Industry Association, Amicus Curiae.

No. 98-9518.
United States Court of Appeals,
Tenth Circuit.
Aug. 18, 1999.

Before TACHA, EBEL, and BRISCOE, Circuit Judges.

TACHA, Circuit Judge.

Pursuant to 28 U.S.C. s 2342(1) and 47 U.S.C. s 402(a), U.S. West, Inc. petitions for review of a Federal Communication Commission ("FCC") order restricting the use and disclosure of and access to customer proprietary network information ("CPNI"). See Second Report and Order and Further Notice of Proposed Rulemaking: In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Consumer

Proprietary Network Information and Other Customer Information; Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, 63 Fed.Reg. 20,326 (1998) ("CPNI Order"). Petitioner argues that the regulations adopted by the CPNI Order constitute an arbitrary and capricious interpretation of the controlling provisions of 47 U.S.C. s 222 and are impermissible because they violate the First and Fifth Amendments of the United States Constitution. The regulations require telecommunications companies, in most instances, to obtain affirmative approval from a customer before the company can use that customer's CPNI for marketing purposes. We vacate the FCC's CPNI Order, concluding that the FCC failed to adequately consider the constitutional ramifications of the regulations interpreting s 222 and that the regulations violate the First Amendment.

I. Introduction

This case involves classic issues of separation of powers and the courts' necessary role as guardians of constitutional interests. It is seductive for us to view this as just another case of reviewing agency action. However, this case is a harbinger of difficulties encountered in this age of exploding information, when rights bestowed by the United States Constitution must be guarded as vigilantly as in the days of handbills on public sidewalks. In the name of deference to agency action, important civil liberties, such as the First Amendment's protection of speech, could easily be overlooked. Policing the boundaries among constitutional guarantees, legislative mandates, and

administrative interpretation is at the heart of our responsibility. This case highlights the importance of that role.

II. Background

The dispute in this case involves regulations the FCC promulgated to implement provisions of 47 U.S.C. s 222, which was enacted as part of the Telecommunications Act of 1996. Section 222, entitled "Privacy of customer information," states generally that "[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to ... customers." 47 U.S.C. s 222(a). To effectuate that duty, s 222 places restrictions on the use, disclosure of, and access to certain customer information. At issue here are the FCC's regulations clarifying the privacy requirements for CPNI. [FN1] The *1229 central provision of s 222 dealing with CPNI is s 222(c)(1), which states:

FN1. The statute recognizes three types of customer information: (1) CPNI; (2) aggregate customer information; and (3) subscriber list information. The statute defines CPNI as: (A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone tool service received by a customer of a

> carrier; except that such term does not include subscriber list information. 47 U.S.C. s 222(f)(1)(A)-(B). Given the sensitive nature of some CPNI, such as when, where, and to whom a customer places calls, Congress afforded CPNI the highest level of privacy protection under s 222. By way of comparison, aggregate customer information is "collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed," id. s 222(f)(2), and subscriber list information consists of the type of information normally published in telephone directories, such as names, numbers, addresses and primary advertising classifications, see id. s 222(f)(3). Congress afforded these other types of customer information substantially less privacy protection under s 222. See id. ss 222(c)(3), (e).

Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunication service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

Section 222(d) provides three additional exceptions to the CPNI privacy requirements. Those exceptions allow

a telecommunications carrier to use, disclose or permit access to CPNI:

(1) to initiate, render, bill, and collect for telecommunications services,

(2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services, or

(3) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service.

47 U.S.C. s 222(d).

Therefore, the essence of the statutory scheme requires a telecommunications carrier to obtain customer approval when it wishes to use, disclose, or permit access to CPNI in a manner not specifically allowed under s 222.

Section 222 is not the first time the government has placed restrictions on telecommunications carriers' use or disclosure of CPNI. Prior to the enactment of s 222, the FCC had imposed CPNI requirements on the enhanced service operations of several major telecommunications carriers. See CPNI Order p 7. The FCC imposed these CPNI requirements primarily to prevent large carriers from gaining a competitive advantage in the unregulated enhanced services markets through the use of CPNI, thereby protecting smaller carriers. See id. In contrast, Congress made s 222, which is much broader in scope than previous CPNI requirements, applicable to all carriers, not just the

dominant ones. This suggests that Congress enacted s 222 for a substantially different purpose than previous FCC CPNI requirements.

Faced with the new CPNI restrictions, various telecommunications companies and trade associations sought FCC guidance regarding their obligations under s 222. See id. p 6 & n. 25. These requests, along with a petition for a declaratory ruling regarding the interpretation of the term "telecommunication service" under s 222(c)(1), prompted the FCC to commence a rulemaking on May 17, 1996. See id. p 6; In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunication Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Notice of Proposed Rulemaking, 61 Fed.Reg. 26,483 (1996) ("CPNI NPRM"). The CPNI NPRM sought comment on, among other things: "(1) the scope of the phrase 'telecommunications service,' as it is used in section 222(c)(1) ...; (2) the requirements *1230 for customer approval; and (3) whether the Commission's existing CPNI requirements should be amended in light of section 222." CPNI Order p 6 (citing CPNI NPRM pp 20-33, 38-42). On February 26, 1998, the FCC released the CPNI Order we now review. The CPNI Order addresses the meaning and scope of s 222 and adopts regulations to implement the statute's CPNI requirements. See 47 C.F.R. pt. 64, subpt. U (1998). The regulations adopted by the CPNI Order interpret s 222(c)(1) through a framework known as the "total service approach." That approach divides the term "telecommunications service" into three service categories: (1) local; (2) interexchange (which includes most long-distance toll service); and (3)

commercial mobile radio service ("CMRS") (which includes mobile or cellular service). See 47 C.F.R. s 64.2005(a). Broadly stated, the regulations permit a telecommunications carrier to use, disclose, or share CPNI for the purpose of marketing products within a category of service to customers, provided the customer already subscribes to that category of service. See id. However, the carrier may not, without customer approval, use, disclose, or permit access to CPNI for the purpose of marketing categories of service to which the customer does not already subscribe. See id. s 64.2005(b). [FN2] For example, petitioner could use CPNI obtained through the provision of local service to market other local service products, but not cellular services. Moreover, if the customer subscribes to both local and long-distance services, petitioner could use the CPNI to market either service and could exchange the CPNI between affiliates that provide such services, but petitioner could still not use the CPNI to market cellular services. In addition, the regulations prevent telecommunications carriers from using, without customer approval, CPNI gained from any of the three categories described above to: (1) market customer premises equipment ("CPE") or information services (such as call answering, voice mail, or Internet access services); (2) identify or track customers that call competitors; and (3) regain the business of customers who have switched to another carrier. See id. s 64.2005(b)(1)-(3). The regulations also set forth some additional narrow exceptions to the CPNI requirements, other than those stated in s 222(d). See id. s 64.2005(c).

FN2. The regulations treat affiliated entities of a carrier as separate for the purposes of use or

disclosure. Thus, the regulations permit unapproved disclosure of CPNI between affiliated entities of a telecommunications carrier only when the carrier provides different categories of service and the customer subscribes to more than one category of service. See id. ss 64.2005(a)(1)-(2).

The regulations also describe the means by which a carrier must obtain customer approval. Section 222(c)(1) did not elaborate as to what form that approval should take. The FCC decided to require an "opt-in" approach, in which a carrier must obtain prior express approval from a customer through written, oral, or electronic means before using the customer's CPNI. See 47 C.F.R. s 64.2007(b). The government acknowledged that the means of approval could have taken numerous other forms, including an "opt-out" approach, in which approval would be inferred from the customer-carrier relationship unless the customer specifically requested that his or her CPNI be restricted.

Petitioner challenges the FCC's chosen approval process, claiming it violates the First Amendment by restricting its ability to engage in commercial speech with customers. In addition, petitioner argues that the CPNI regulations raise serious Fifth Amendment Takings Clause concerns because CPNI represents valuable property that belongs to the carriers and the regulations greatly diminish its value. The respondents assert that the FCC's CPNI regulations raise no constitutional concerns, are reasonable, and are entitled to deference under the Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

*1231 III. Discussion

A. Standard of Review

Under the Administrative Procedure Act, we review a final FCC order to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. s 706(2)(A), or "contrary to constitutional right, power, privilege, or immunity," id. s 706(2)(B). See Long v. Board of Governors of the Fed. Reserve Sys., 117 F.3d 1145, 1151 (10th Cir.1997); City of Albuquerque v. Browner, 97 F.3d 415, 424 (10th Cir.1996). In addition, when the question before us involves an agency's interpretation of a statute it administers, we utilize the two-step approach announced in Chevron. See, e.g., Sierra Club v. EPA, 99 F.3d 1551, 1555 (10th Cir.1996). When Congress has spoken to the precise question at issue, we must give effect to the express intent of Congress. See Chevron, 467 U.S. at 842-43, 104 S.Ct. 2778. However, if the statute is silent or ambiguous, we defer to the agency's interpretation, if it is reasonable. See id. at 843-44, 104 S.Ct. 2778. The agency's interpretation of the statute need not be the only reasonable or most reasonable interpretation, see id. at 843 n. 11, 104 S.Ct. 2778, but an unconstitutional interpretation is not entitled to Chevron deference.

In addition, deference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions. See Rust v. Sullivan, 500 U.S. 173, 190- 91, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991);

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575-76, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988); Williams v. Babbitt, 115 F.3d 657, 661- 62 (9th Cir.1997), cert. denied sub nom. Kawerak Reindeer Herders Ass'n v. Williams, --- U.S. ----, 118 S.Ct. 1795, 140 L.Ed.2d 936 (1998); Chamber of Commerce of the United States v. FEC, 69 F.3d 600, 605 (D.C.Cir.1995); Kohler Co. v. Moen Inc., 12 F.3d 632, 634 n. 2 (7th Cir.1993). When faced with a statutory interpretation that "would raise serious constitutional problems, the [c]ourt[s] will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." DeBartolo Corp., 485 U.S. at 575, 108 S.Ct. 1392. We follow this approach because we assume that Congress legislates with constitutional limitations in mind and will speak clearly when it seeks to test those limitations. See Rust, 500 U.S. at 191, 111 S.Ct. 1759; DeBartolo Corp., 485 U.S. at 575, 108 S.Ct. 1392; Williams, 115 F.3d at 662; International Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. OSHA, 938 F.2d 1310, 1317 (D.C.Cir.1991) ("In effect we require a clear statement by Congress that it intended to test the constitutional waters."). The Williams court aptly explained the doctrine as it applies to agencies: [J]ust as we will not infer from an ambiguous statute that Congress meant to encroach on constitutional boundaries, we will not presume from ambiguous language that Congress intended to authorize an agency to do so. At the core of DeBartolo lies the presumption that, if Congress means to push the constitutional envelope, it must do so explicitly. Williams, 115 F.3d at 662.

Petitioner raises First and Fifth Amendment challenges to the approval procedure adopted by the FCC. The parties agree that Congress did not explicitly set forth the form of customer approval carriers must obtain. Therefore, if we determine that the FCC's customer approval rule presents a serious or grave constitutional question, we will owe the FCC no deference, even if its CPNI regulations are otherwise reasonable, and will apply the rule of constitutional doubt.

B. Do the CPNI regulations violate the First Amendment?

Petitioner argues that the CPNI regulations interpreting 47 U.S.C. s 222 violate the First Amendment. The First Amendment states, "Congress shall make *1232 no law ... abridging the freedom of speech." U.S. Const. amend. I. Although the text of the First Amendment refers to legislative enactments by Congress, it is actually much broader in scope and encompasses, among other things, regulations promulgated by administrative agencies. See, e.g., Rust, 500 U.S. at 192, 111 S.Ct. 1759 (subjecting Department of Health and Human Services regulations limiting the ability of Title X fund recipients to engage in abortion-related activities to review under the First Amendment).

1. Do the CPNI regulations restrict speech?

As a threshold requirement for the application of the First Amendment, the government action must abridge or restrict protected speech. The government argues that the FCC's CPNI regulations do not violate or even infringe

upon petitioner's First Amendment rights because they only prohibit it from using CPNI to target customers and do not prevent petitioner from communicating with its customers or limit anything that it might say to them. This view is fundamentally flawed. Effective speech has two components: a speaker and an audience. A restriction on either of these components is a restriction on speech. Cf. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (noting that the First Amendment protects the communication, whether the speech restriction applies to its source or impinges upon the audience's reciprocal right to receive the communication); Martin v. City of Struthers, 319 U.S. 141, 143, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) (noting the First Amendment "embraces the right to distribute literature and necessarily protects the right to receive it"). In other words, a restriction on speech tailored to a particular audience, "targeted speech," cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience, "broadcast speech."

Perhaps the Supreme Court case of Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995), best illustrates this. In Went For It, a lawyer referral service and an individual lawyer challenged a Florida Bar rule that prohibited attorneys from using direct mail advertisements to solicit wrongful death and personal injury clients within thirty days of the accident or disaster causing death or injury. See 515 U.S. at 620-21, 115 S.Ct. 2371. Despite the fact that the attorney could indiscriminately mail solicitations for his services, the court

found that the targeted speech constituted commercial speech and that the restriction on the targeted speech implicated the First Amendment. See id. at 623, 115 S.Ct. 2371 [FN3]; see also Ficker v. Curran, 119 F.3d 1150, 1153-56 (4th Cir.1997) (applying First Amendment analysis to direct mail solicitations by attorneys to criminal and traffic defendants); Revo v. Disciplinary Bd. of the Sup.Ct. for the State of N.M., 106 F.3d 929, 932-33 (10th Cir.) (determining that lawyer's direct mail advertising to personal injury victims and family members of wrongful death victims constituted protected commercial speech), cert. denied, 521 U.S. 1121, 117 S.Ct. 2515, 138 L.Ed.2d 1017 (1997). Therefore, the existence of alternative channels of communication, such as broadcast speech, does not eliminate the fact that the CPNI regulations restrict speech.

FN3. The court did, however, consider this fact in determining whether the speech restriction was narrowly tailored. See id. at 633-34.

2. What kind of speech is restricted?

Because petitioner's targeted speech to its customers is for the purpose of soliciting those customers to purchase more or different telecommunications services, it "does no more than propose a commercial transaction," Virginia State Bd. of Pharmacy, 425 U.S. at 760, 96 S.Ct. 1817 (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385, *1233 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973)). Consequently, the targeted speech in this case fits soundly within the definition of commercial speech. See id.;

Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 970 (10th Cir.1996); see also e.g., Bad Frog Brewery, Inc. v. New York State Liquor Auth., 134 F.3d 87, 97 (2d Cir.1998) ("The 'core notion' of commercial speech includes speech which does no more than propose a commercial transaction." (internal quotation marks and citation omitted)). It is well established that nonmisleading commercial speech regarding a lawful activity is a form of protected speech under the First Amendment, although it is generally afforded less protection than noncommercial speech. See, e.g., Went For It, 515 U.S. at 623, 115 S.Ct. 2371; Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 562-63, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The parties do not dispute that the commercial speech based on CPNI is truthful and nonmisleading. Therefore, the CPNI regulations implicate the First Amendment by restricting protected commercial speech. [FN4]

FN4. Petitioner argues that because the CPNI regulations also burden its internal business communications (e.g., communications between its affiliates, divisions, and employees), we should subject the regulations to the more stringent level of First Amendment scrutiny applied to restrictions on noncommercial speech. Without deciding whether the incidental burden on internal business communications necessarily implicates the First Amendment or whether petitioner has standing to assert such an argument, we find that, in this case,

(FN4) the intra-carrier speech is properly categorized as commercial speech and consequently its existence does not impact our analysis.

Petitioner asserts that the intra-carrier speech does not directly propose a commercial transaction to customers and therefore falls outside the definition of commercial speech. We disagree. Although speech that merely proposes a commercial transaction is at the "core" of commercial speech, it does not constitute the universe of commercial speech. Indeed, the Supreme Court has defined commercial speech in broader terms as "expression related solely to the economic interests of the speaker and its audience." Central Hudson, 447 U.S. at 561, 100 S.Ct. 2343. It is, admittedly, unclear to what extent Central Hudson broadened the definition of commercial speech. As another circuit recently stated, "the Court has not offered any nuanced distinctions between the two standards [i.e., the Virginia Pharmacy and Central Hudson definitions], and the Court noted in Discovery Network that it had not utilized the broader test in its recent commercial speech cases." Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n, 149 F.3d 679, 685 (7th Cir.1998) (citing City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 422, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993)). Consequently, we are hesitant to broadly expand the definition of commercial speech. However, in this case, when the sole purpose of the intra-carrier

(FN4) speech based on CPNI is to facilitate the marketing of telecommunications services to individual customers, we find the speech integral to and inseparable from the ultimate commercial solicitation. Therefore, the speech is properly categorized as commercial speech.

3. Central Hudson analysis

We analyze whether a government restriction on commercial speech violates the First Amendment under the four-part framework set forth in Central Hudson. First, we must conduct a threshold inquiry regarding whether the commercial speech concerns lawful activity and is not misleading. See Central Hudson, 447 U.S. at 566, 100 S.Ct. 2343. If these requirements are not met, the government may freely regulate the speech. See Went For It, 515 U.S. at 623-24, 115 S.Ct. 2371; Revo, 106 F.3d at 932. If this threshold requirement is met, the government may restrict the speech only if it provess: "(1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest." Revo, 106 F.3d at 932 (citing Central Hudson, 447 U.S. at 564-65, 100 S.Ct. 2343). [FN5] *1234 As noted above, no one disputes that the commercial speech based on CPNI is truthful and nonmisleading. We therefore proceed directly to whether the government has satisfied its burden under the remaining three prongs of the Central Hudson test.

FN5. In 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), the Supreme Court established a slight modification to the Central Hudson framework by giving force to a footnote contained in Central Hudson. Justice Stevens, writing for a four Justice plurality, stated that when a regulation constitutes a blanket prohibition against truthful, nonmisleading speech about a lawful product and the ban serves an interest unrelated to consumer protection, it will be subject to a heightened form of First Amendment scrutiny akin to strict scrutiny. See id. at 504 (opinion of Stevens, J.) (citing Central Hudson, 447 U.S. at 566 n. 9, 100 S.Ct. 2343). Under such circumstances, we must review the regulation under Central Hudson with "special care, mindful that speech prohibitions of this type rarely survive constitutional review." Id. (opinion of Stevens, J.) (internal quotation marks and citation omitted). Although only four Justices subscribed to this view, given Justice Thomas' concurrence in which he stated that he would abandon Central Hudson altogether and apply traditional strict scrutiny under similar circumstances, see id. at 518, 116 S.Ct. 1495 (Thomas, J., concurring), it is the narrowest majority holding, and we are bound by it. In this case, however, the regulation at issue does not constitute a blanket prohibition of speech. Indeed, the telecommunications carriers may utilize a multitude of communication channels to say whatever they want to their customers. They

simply cannot use CPNI to target customers for marketing efforts. Thus, the CPNI regulations are not subject to heightened scrutiny under 44 Liquormart.

a. Does the government have a substantial state interest in regulating speech involving CPNI?

The respondents argue that the FCC's CPNI regulations advance two substantial state interests: protecting customer privacy and promoting competition. While, in the abstract, these may constitute legitimate and substantial interests, we have concerns about the proffered justifications in the context of this case. Privacy considerations of some sort clearly drove the enactment of s 222. The concept of privacy, though, is multi-faceted. Indeed, one can apply the moniker of a privacy interest to several understandings of privacy, such as the right to have sufficient moral freedom to exercise full individual autonomy, the right of an individual to define who he or she is by controlling access to information about him or herself, and the right of an individual to solitude, secrecy, and anonymity. [FN6] See Fred H. Cate, Privacy in the Information Age 19-22 (1997); Joseph I. Rosenbaum, Privacy on the Internet: Whose Information Is It Anyway?, 38 Jurimetrics J. 565, 566-67 (1998). The breadth of the concept of privacy requires us to pay particular attention to attempts by the government to assert privacy as a substantial state interest.

FN6. We emphasize that the privacy interest in this case is distinct and different from the more limited

notion of a constitutional right to privacy which is addressed in cases such as Griswold v. Connecticut, 381 U.S. 479, 484-86, 85 S.Ct.1678, 14 L.Ed.2d 510 (1965), and Roe v. Wade, 410 U.S. 113, 152-56, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (stating that the constitutional right to privacy covers only personal rights deemed "fundamental" or "implicit in the concept of ordered liberty" (internal quotation marks and citations omitted)). Here, the question is solely whether privacy can constitute a substantial state interest under Central Hudson, not whether the FCC regulations impinge upon an individual's right to privacy under the Constitution.

When faced with a constitutional challenge, the government bears the responsibility of building a record adequate to clearly articulate and justify the state interest. "[T]he Central Hudson standard does not permit us to supplant the precise interests put forward by the State with other suppositions." Edenfield v. Fane, 507 U.S. 761, 768, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). Although we agree that privacy may rise to the level of a substantial state interest, see, e.g., Went For It, 515 U.S. at 625, 115 S.Ct. 2371 ("Our precedents leave no room for doubt that 'the protection of potential clients' privacy is a substantial state interest' " (quoting Edenfield, 507 U.S. at 769, 113 S.Ct. 1792)), the government cannot satisfy the second prong of the Central Hudson *1235 test by merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served. Moreover, privacy is not an absolute good because it imposes real costs on society.

[FN7] Therefore, the specific privacy interest must be substantial, demonstrating that the state has considered the proper balancing of the benefits and harms of privacy. In sum, privacy may only constitute a substantial state interest if the government specifically articulates and properly justifies it.

FN7. Professor Cate lists a number of costs privacy imposes. For example, privacy "facilitates the dissemination of false information," by making it more difficult for individuals and institutions to discover falsities. Cate, supra, at 28. Privacy also "protects the withholding of relevant true information," such as when an employee fails to disclose a medical condition that would affect his or her job performance. Id. In addition, privacy interferes with the collection, organization, and storage of information which can assist businesses in making rapid, informed decisions and efficiently marketing their products or services. In this sense, privacy may lead to reduced productivity and higher prices for those products or services. See id. at 28-29. Privacy may even threaten physical safety by interfering with the public's ability to access information needed to protect themselves, such as whether an individual has a history of child abuse or molestation, sexual offenses, or communicable diseases. See id. at 29. Finally, privacy impedes upon individual voyeuristic curiosity which "opens people's eyes to opportunities and dangers." Id. at 29-30.

In the context of a speech restriction imposed to protect privacy by keeping certain information confidential, the government must show that the dissemination of the information desired to be kept private would inflict specific and significant harm on individuals, such as undue embarrassment or ridicule, intimidation or harassment, or misappropriation of sensitive personal information for the purposes of assuming another's identity. Although we may feel uncomfortable knowing that our personal information is circulating in the world, we live in an open society where information may usually pass freely. A general level of discomfort from knowing that people can readily access information about us does not necessarily rise to the level of a substantial state interest under Central Hudson for it is not based on an identified harm.

Neither Congress nor the FCC explicitly stated what "privacy" harm s 222 seeks to protect against. The CPNI Order notes that "CPNI includes information that is extremely personal to customers ... such as to whom, where, and when a customer places a call, as well as the types of service offerings to which the customer subscribes," CPNI Order at p 2, and it summarily finds "call destinations and other details about a call ... may be equally or more sensitive [than the content of the calls]," id. at p 94. The government never states it directly, but we infer from this thin justification that disclosure of CPNI information could prove embarrassing to some and that the government seeks to combat this potential harm.

We have some doubts about whether this interest, as presented, rises to the level of "substantial." We would

prefer to see a more empirical explanation and justification for the government's asserted interest. Cf. Went For It, 515 U.S. at 630, 115 S.Ct. 2371 (describing the record provided by the Bar cataloguing citizen outrage at being solicited just after injury or family tragedy). In addition, the authority relied upon by the government, Edenfield v. Fane, recognizes a state's interest in protecting against unwanted intrusions caused by solicitations, see 507 U.S. at 769, 113 S.Ct. 1792; see also Went For It, 515 U.S. at 625, 115 S.Ct. 2371, but it says nothing about the disclosure of allegedly sensitive information. On the other hand, we recognize the government may have a legitimate interest in helping protect certain information. Cf. Lanphere & Urbaniak v. Colorado, 21 F.3d 1508, 1514 (10th Cir.1994) (finding a substantial state interest in the need to protect the privacy of those charged with traffic offenses and DUI against dissemination of charging information for commercial purposes). Therefore, notwithstanding our reservations, *1236 we assume for the sake of this appeal that the government has asserted a substantial state interest in protecting people from the disclosure of sensitive and potentially embarrassing personal information. [FN8]

FN8. In its brief and at oral argument, the FCC intimated that consumer privacy concerns might also encompass an interest in preventing the customer intrusion that accompanies broad use of CPNI for telemarketing purposes. However, this particular privacy justification is lacking from the FCC record. In fact, the only reference to marketing intrusion into customer privacy comes in paragraph 100 of the CPNI Order in response to

> U.S. West's attempts to explain why it had such difficulty obtaining authorization to use CPNI in a telemarketing and direct-mail study it conducted. In paragraph 100, the FCC stated:
> [E]ven if U S WEST is correct, and customers do not grant approval simply because they do not want to be marketed to, this finding would not support permitting notice and opt-out. Indeed, it would suggest, as MCI observes, that contrary to U S WEST's claim, customers do not want to hear about "expanding service offerings," and in particular do not want their CPNI used towards that end. CPNI Order p 100. Such a terse statement, made only in the limited context of refuting U.S. West's expansive reading of its prior market study, provides insufficient evidence that the FCC sought to promote customer privacy by limiting intrusion into customer households through telemarketing made possible by CPNI sharing.

We harbor different reservations about the government's asserted interest in competition. While we afford agencies broad deference in interpreting a statute they are charged to administer, they must obey the dictates of Congress and administer the statute true to Congress' intent. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). We are not satisfied that the interest in promoting competition was a significant consideration in the enactment of s 222.

While the broad purpose of the Telecommunications Act of 1996 is to foster increased competition in the

telecommunications industry, [FN9] the language of s 222 reveals no such concern. [FN10] Rather, the specific and dominant purpose of s 222 is the protection of customer privacy. Indeed, the FCC and members of Congress characterize s 222 as "striv[ing] to balance both the competitive and consumer privacy interests with respect to CPNI," Joint Statement of Managers, S. Conf. Rep. No. 104-230, at 205 (1996) (emphasis added), which suggests that s 222's purpose in fostering privacy may even run counter to the broad pro-competition purpose of the Telecommunications Act. In any event, three other considerations persuade us that Congress did not intend for competition to be a significant purpose of s 222. First, and most important, the plain language of the section deals almost exclusively with privacy. Section 222 is entitled "Privacy of customer information" and is replete with references to privacy and confidentiality of customer information. In contrast, s 222 contains no explicit mention of competition. Although s 222(c)(3) and s 222(e) impose nondiscrimination requirements with respect to disclosure *1237 of aggregate customer and subscriber list information which could be construed as pro-competition measures, we find that these do not sufficiently indicate that increasing competition was a purpose of s 222. Moreover, the provisions of s 222 relating to CPNI which the challenged regulations interpret contain no reference to nondiscrimination requirements and reflect solely a concern for customer privacy. See 47 U.S.C. s 222(c)(1)-(2), (d). Second, s 222 differs from previous CPNI restrictions designed to foster competition because it applies to all telecommunications carriers, not just the dominant ones. This indicates a different purpose for the new restriction.

Finally, s 222 contains measures that will allow full use, disclosure, and access to CPNI if customer approval is obtained. Assuming that a carrier is able to obtain a high rate of customer approval, the alleged competitive effect of s 222's CPNI restrictions is minimal and can perhaps even be nullified. Consequently, we find that Congress' primary purpose in enacting s 222 was concern for customer privacy, not the broader purpose of increasing competition.

FN9. The preamble to the Act states: "An act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub.L. No. 104-104, 110 Stat. 56, 56 (1996).

FN10. While the broad purposes of an Act frequently provide useful insight into the purposes served by a narrow provision of the Act, blind adherence to broad purposes can obfuscate Congress' true intent regarding a particular provision, particularly when that provision has an unambiguous, specific, and dominant purpose. See Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373-74, 106 S.Ct. 681, 88 L.Ed.2d 691 (1986) ("Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action.... Invocation of

> the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.").

Even though we conclude that competition did not constitute the primary purpose of the section, we recognize that Congress may not have completely ignored competition in drafting s 222. While we believe that the asserted interest in increasing competition would not suffice, by itself, to justify the FCC's rule, we will, in this case, consider it in concert with the government's interest in protecting consumer privacy.

b. Does the Regulation Directly and Materially Advance the State's Interests?

Under the next prong of Central Hudson, the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield v. Fane, 507 U.S. 761, 771, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993); accord Rubin v. Coors Brewing Co., 514 U.S. 476, 487, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995). "This burden is not satisfied by mere speculation or conjecture." Edenfield, 507 U.S. at 770, 113 S.Ct. 1792. On the record before us, the government fails to meet its burden. The government presents no evidence showing the harm to either privacy or competition is real. Instead, the government relies on speculation that harm to privacy and competition for new services will result if carriers use CPNI. In Edenfield, the Supreme Court struck down a Florida ban on CPA in-person solicitation because

the state had presented no evidence--anecdotal or empirical--that such solicitation created the dangers of "fraud, overreaching, or compromised independence" that the state sought to combat. See 507 U.S. at 771, 113 S.Ct. 1792; cf. Florida Bar v. Went For It, Inc., 515 U.S. 618, 626-27, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) (upholding restriction on solicitation of accident victims within thirty days of accident, based on two- year study and written report analyzing statistically and anecdotally the impacts of such solicitation). The FCC faces the same problem here. While protecting against disclosure of sensitive and potentially embarrassing personal information may be important in the abstract, we have no indication of how it may occur in reality with respect to CPNI. Indeed, we do not even have indication that the disclosure might actually occur. The government presents no evidence regarding how and to whom carriers would disclose CPNI. By its own admission, the government is not concerned about the disclosure of CPNI within a firm. See CPNI Order at p 55, n. 203 ("[W]e agree ... that sharing of CPNI within one integrated firm does not raise significant privacy concerns because customers would not be concerned with having their CPNI disclosed within a firm in order to receive increased competitive offerings."). Yet the government has not explained how or why a carrier would disclose CPNI to outside parties, especially when the government claims CPNI is information that would give one firm a competitive advantage over another. This *1238 leaves us unsure exactly who would potentially receive the sensitive information.

Similarly, the FCC can theorize that allowing existing carriers to market new services with CPNI will impede competition for those services, but it provides no analysis of how or if this might actually occur. Beyond its own speculation, the best the government can offer is that "[t]he vigor of U.S. West's protests against the rules ... indicates that U.S. West also believes that this restriction will be effective in promoting Congress's competitive interest." Appellees Br. at 30. This is simply additional conjecture, and it is inadequate to justify restrictions under the First Amendment. See Edenfield, 507 U.S. at 770-71, 113 S.Ct. 1792.

c. Are the CPNI regulations narrowly tailored?

Even assuming, arguendo, that the state interests in privacy and competition are substantial and that the regulations directly and materially advance those interests, we do not find, on this record, the FCC rules regarding customer approval properly tailored. The CPNI regulations must be "no more extensive than necessary to serve [the stated] interest[s]." Rubin, 514 U.S. at 486, 115 S.Ct. 1585. In order for a regulation to satisfy this final Central Hudson prong, there must be a fit between the legislature's means and its desired objective--"a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) (internal quotation marks omitted). While clearly the government need not employ the least restrictive means to accomplish its goal, it must utilize a

means that is "narrowly tailored" to its desired objective. Id.; Florida Bar v. Went For It, Inc., 515 U.S. 618, 632, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995). Narrow tailoring means that the government's speech restriction must signify a "carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition." Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (internal quotation marks omitted). "The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny." 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 529, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (O'Connor, J., concurring); see also, e.g., Romer v. Evans, 517 U.S. at 632, 116 S.Ct. 1620; Rubin, 514 U.S. at 490-91, 115 S.Ct. 1585; Discovery Network, 507 U.S. at 417 n. 13, 113 S.Ct. 1505. This is particularly true when such alternatives are obvious and restrict substantially less speech. [FN11] See Fox, 492 U.S. at 479, 109 S.Ct. 3028 ("[A]lmost all of the restrictions disallowed under Central Hudson 's fourth prong have been substantially excessive, disregarding 'far less restrictive and more precise means.' " (quoting Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 476, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988)).

FN11. While this pronouncement, in effect, imposes a burden on the government to consider certain less restrictive means--those that are obvious and restrict substantially less speech--it does not amount to a least restrictive means test. We do not require the government to consider

> every conceivable means that may restrict less speech and strike down regulations when any less restrictive means would sufficiently serve the state interest. We merely recognize the reality that the existence of an obvious and substantially less restrictive means for advancing the desired government objective indicates a lack of narrow tailoring.

It is difficult, if not impossible, for us to conduct a full and proper narrow tailoring analysis, given the deficiencies that we have already encountered with respect to the previous portions of the Central Hudson test. Nevertheless, on this record, the FCC's failure to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy, indicates that it did not narrowly *1239 tailor the CPNI regulations regarding customer approval. The respondents argue that the record contains adequate support that the CPNI regulations are narrowly tailored because a study conducted by petitioner U.S. West shows that a majority of individuals, when affirmatively asked for approval to use CPNI, refused to grant it. The U.S. West study shows that 33% of those called refused to grant approval to use their CPNI, 28% granted such approval, and 39% either hung up or asked not to be called again. See CPNI Order p 99 n. 380. Additionally, U.S. West secured a 72% affirmative response rate from customers whom it solicited after they initiated contact with the company for some other reason. [FN12] See id. p 99 n. 378. This study does not provide sufficient evidence that customers do not want carriers to use their CPNI. The results may simply reflect that a substantial

number of individuals are ambivalent or disinterested in the privacy of their CPNI or that consumers are averse to marketing generally. The FCC stated that the study supported "an equally plausible interpretation ... that many customers value the privacy of their personal information and do not want it shared for purposes beyond the existing service relationship." CPNI Order p 100. We are not convinced that the study supports the FCC's interpretation, and the FCC provides no additional evidence to bolster its argument.

> FN12. U.S. West also solicited approval from customers by mail. Only six to eleven percent of residential customers and only five to nine percent of business customers responded to the direct mail trial. See CPNI Order p 99 n. 378.

Even assuming that telecommunications customers value the privacy of CPNI, the FCC record does not adequately show that an opt-out strategy would not sufficiently protect customer privacy. The respondents merely speculate that there are a substantial number of individuals who feel strongly about their privacy, yet would not bother to opt-out if given notice and the opportunity to do so. Such speculation hardly reflects the careful calculation of costs and benefits that our commercial speech jurisprudence requires. Finally, respondents assert that under FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978), the FCC can rely upon its common sense judgment based on experience, notwithstanding the inclusiveness of the rulemaking record. We refuse to extend the rule announced in National Citizens

in the manner respondents suggest. National Citizens involved agency conclusions regarding "elusive concepts, not easily defined let alone measured without making qualitative judgments," id. at 796-97, 98 S.Ct. 2096 (internal quotation marks omitted), and information that was difficult to compile. We see no such problems in this case. Furthermore, in National Citizens, the FCC's common sense judgment only supported a finding that it "acted rationally" in promulgating a rule. Id. at 796, 98 S.Ct. 2096. The burden under the fourth prong of Central Hudson is significantly higher. The FCC must not only demonstrate that it acted rationally, but that it narrowly tailored its regulations to meet its stated goals.

In sum, even assuming that respondents met the prior two prongs of Central Hudson, we conclude that based on the record before us, the agency has failed to satisfy its burden of showing that the customer approval regulations restrict no more speech than necessary to serve the asserted state interests. [FN13] Consequently, we find that the CPNI regulations interpreting the customer approval requirement of 47 U.S.C. s 222(c) violate the First Amendment. [FN14]

FN13. We reiterate that even if the opt-in approach is narrowly tailored with respect to protecting competition, the interest advanced in protecting competition here is insufficient by itself to justify the CPNI regulations under the Central Hudson test. See supra Part III.B.3.a.

FN14. Because we vacate the CPNI restrictions on First Amendment grounds, we need not address whether they have effected a "taking" under the Fifth Amendment or whether they are otherwise arbitrary and capricious.

*1240 IV. Conclusion

The FCC failed to adequately consider the constitutional implications of its CPNI regulations. Even if we accept the government's proffered interests and assume those interests are substantial, the FCC still insufficiently justified its choice to adopt an opt-in regime. Consequently, its CPNI regulations must fall under the First Amendment. At the very least, the foregoing analysis shows that the CPNI regulations clearly raise a serious constitutional question, invoking the rule of constitutional doubt. Accordingly, we VACATE the FCC's CPNI Order and the regulations adopted therein. [FN15]

FN15. The dissent accuses us of "advocating" an opt-out approach. We do not "advocate" any specific approach. We merely find fault in the FCC's inadequate consideration of the approval mechanism alternatives in light of the First Amendment.

DISSENTING OPINION

BRISCOE, Circuit Judge, dissenting:

I respectfully dissent. When properly considered, neither of the constitutional challenges asserted by U.S. West warrants setting aside the FCC's CPNI Order, which I believe represents a reasonable interpretation of 47 U.S.C. s 222. I would therefore deny the petition for review and affirm the CPNI Order.

I.

Before addressing U.S. West's challenges to the CPNI Order, I begin by briefly recounting how this dispute arose. In 1996, Congress decided to place restrictions on the use of CPNI collected by telecommunications carriers. In particular, Congress chose to require carriers to obtain customer approval prior to using, disclosing, or allowing access to individually identifiable CPNI. See 47 U.S.C. s 222. Following enactment of s 222, the FCC received several informal requests from members of the telecommunications industry for guidance in interpreting the statute's customer approval requirement. The FCC responded by issuing a Notice of Proposed Rulemaking "tentatively conclud[ing] ... that regulations interpreting and specifying in greater detail a carrier's obligations under section 222 would be in the public interest," and seeking public comment on various aspects of s 222, including the statute's customer approval requirement. CPNI Order, at 12.

On February 26, 1998, the FCC issued its CPNI Order interpreting s 222's customer approval requirements. In pertinent part, the FCC concluded s 222 was ambiguous in that it did "not specify what kind of approval [wa]s required" to be obtained by a carrier prior to use of individually identifiable CPNI. Id. at 67. In resolving this ambiguity, the FCC noted that interested parties (including U.S. West) had "offer[ed] three separate views, ranging from a most restrictive interpretation that would require approval to be in writing, to a permissive one, where carriers merely would need to provide customers with a notice of their intent to use CPNI, and a mechanism for customers to 'opt- out' from this proposed use (notice and opt-out)." Id. After weighing these proffered options, the FCC adopted an "opt-in" approach whereby carriers must "give customers explicit notice of their CPNI rights prior to any solicitation for approval," and then must obtain from the customer "express written, oral, or electronic approval for CPNI uses." Id. at 68.

Dissatisfied with the FCC's selection of the "opt-in" approach, rather than its suggested opt-out approach (which is allegedly cheaper and results in a higher "approval" rate than the opt-in approach), U.S. West filed this action challenging the validity of the FCC's CPNI Order. In particular, U.S. West contends the portion of the CPNI Order interpreting s 222's approval requirement violates the First and Fifth Amendments of the United States Constitution. [FN1] US West also contends that portion *1241 of the CPNI Order is "a gratuitously severe construction" of s 222.

FN1. This litigation strategy is apparently not unique to this case. In another case filed in this circuit involving substantially different facts, U.S. West asserted strikingly similar constitutional arguments. See U.S. West, Inc. v. Tristani, 182 F.3d 1202 (10th Cir.1999) (asserting First and Fifth Amendment challenges to rate order of the New Mexico State Corporation Commission).

II.

"United States Courts of Appeals have been granted exclusive statutory jurisdiction to review the FCC's final orders pursuant to 28 U.S.C. s 2342(1) (1994) and 47 U.S.C. s 402(a) (1994)." Iowa Utilities Bd. v. FCC, 120 F.3d 753, 793 (8th Cir.1997), aff'd in part and rev'd in part, 522 U.S. 1089, 118 S.Ct. 879, 139 L.Ed.2d 867 (1998). In reviewing the CPNI Order at issue in this case, which represents the FCC's construction of a statute it is charged with administering, we are initially "confronted with two questions." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "First, always, is the question whether Congress has directly spoken to the precise question at issue." Id. "If the intent of Congress is clear, that is the end of the matter; for [we], as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43, 104 S.Ct. 2778. "If, however, [we] determine[ ] Congress has not directly addressed the precise question at issue, [we] do[ ] not simply impose [our] own construction on the statute." Id. at 843, 104 S.Ct. 2778.

"Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for [us] is whether the agency's answer is based on a permissible construction of the statute." Id.

In my view, s 222, in particular subsection (c)(1), is unambiguous in the sense that Congress made it abundantly clear it intended for telecommunications carriers to obtain customer "approval" prior to using, disclosing, or permitting access to individually identifiable CPNI. Although Congress did not specifically define the term "approval" in the statute, its ordinary and natural meaning clearly "implies knowledge and exercise of discretion after knowledge." Black's Law Dictionary at 102 (6th ed.1990); see United States v. Roberts, 88 F.3d 872, 877 (10th Cir.1996) (if Congress does not define statutory term, "its common and ordinary usage may be obtained by reference to a dictionary"); United States v. Floyd, 81 F.3d 1517, 1523 (10th Cir.1996) ("In interpreting Congressional intent, a reviewing court must determine whether the language used in a statute is ambiguous, or whether it has an ordinary meaning."). In other words, it is clear from the statute that Congress intended for customers to make an informed decision as to whether they would allow their individually identifiable CPNI to be used. [FN2]

FN2. US West does not deny that the statute requires it to obtain informed consent from each of its customers regarding their individually identifiable CPNI.

The remaining issue is whether the statute indicates the precise method a carrier must use to obtain customer approval. On this point, I agree with the FCC that the statute is ambiguous. See CPNI Order at 70. Although it is clear from the statute that a customer must be made aware of his or her rights regarding CPNI and be allowed to make an informed decision regarding its use, the statute is silent with respect to precisely how a carrier must obtain this approval from its customers. The question therefore becomes whether the FCC's construction of the statute (to remedy the ambiguity) is reasonable. In deciding this question, we "may not substitute [our] own construction of [the] statutory provision for a reasonable interpretation made by the" FCC. Chevron, 467 U.S. at 844, 104 S.Ct. 2778.

Because the approval requirement imposed by Congress in s 222 is fairly rigorous in that it requires customer knowledge and exercise of discretion after knowledge, the methods available for obtaining such approval were obviously limited. Indeed, the CPNI Order indicates interested parties proposed only three possible methods for obtaining approval: (1) requiring express *1242 written approval, (2) requiring express written, oral, or electronic approval (the opt-in method), or (3) requiring only implied approval by allowing carriers to notify customers of their intent to use CPNI and affording customers a mechanism to "opt-out" if they did not want their CPNI to be used (the opt-out method). After quickly disposing of the most restrictive of these three options (i.e., the method requiring express written approval) [FN3], the FCC carefully weighed the advantages and disadvantages of

the two remaining options, i.e., the opt-in and the opt-out approaches. CPNI Order at 67-85. Ultimately, the FCC concluded the opt-in approach was best suited to forwarding the purpose of the statute:

> FN3. See CPNI Order at 87 ("Given that nothing in section 222(c)(1) expressly limits approval to only written means, we conclude that carriers should be given flexibility to secure approval through written, oral or electronic methods.").
>
> We conclude ... that an express approval mechanism is the best means to implement [s 222's approval requirement] because it will minimize any unwanted or unknowing disclosure of CPNI. In addition, such a mechanism will limit the potential for untoward competitive advantages by incumbent carriers. Our conclusion is guided by the natural, common sense understanding of the term "approval," which we believe generally connotes an informed and deliberate response. An express approval best ensures such a knowing response. In contrast, under an opt-out approach, ... because customers may not read their CPNI notices, there is no assurance that any implied consent would be truly informed. We agree with the observations of MCI and Sprint that, insofar as customers may not actually consider CPNI notices under a notice and opt-out approach, they may be unaware of the privacy protections afforded by section 222, and may not understand that they must take affirmative steps to restrict access to

> sensitive information. We therefore find it difficult to construe a customer's failure to respond to a notice as constituting an informed approval of its contents. Accordingly, we adopt a mechanism of express approval because we find that it is the best means at this time to achieve the goal of ensuring informed customer approval. Id. at 70-71.

After reviewing the CPNI Order and the administrative record, I am convinced the FCC's interpretation of s 222, more specifically its selection of the opt-in method for obtaining customer approval, is entirely reasonable. Indeed, the CPNI Order makes a strong case that, of the two options seriously considered by the FCC, the opt-in method is the only one that legitimately forwards Congress' goal of ensuring that customers give informed consent for use of their individually identifiable CPNI. Accordingly, in applying the rubric set forth in Chevron, and barring any serious constitutional problems posed by the CPNI Order, we must defer to the FCC's selection of the opt-in method in resolving the statutory ambiguity presented in this case.

III.

Having concluded the CPNI Order is worthy of deference under the standards outlined in Chevron, I now turn to the constitutional challenges asserted by U.S. West. See Rust v. Sullivan, 500 U.S. 173, 190, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (reviewing challenged regulation under Chevron standards before addressing plaintiff's

constitutional challenges). It is true that courts need not defer to an agency's interpretation of a federal statute if that interpretation raises serious constitutional questions. See DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council, 485 U.S. 568, 574, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) (although NLRB's interpretation of NLRA was normally entitled to deference, Court refused to defer in this instance because the NLRB's interpretation raised serious First Amendment issues). This canon of *1243 statutory construction, however, is not applied in every case where an agency interpretation is challenged on constitutional grounds. Rather, "courts [should] scrutinize constitutional objections to a particular agency interpretation skeptically," and "[o]nly if the agency's proffered interpretation raises serious constitutional concerns [should] a court refuse to defer under Chevron." Williams v. Babbitt, 115 F.3d 657, 662 (9th Cir.1997) (italics in original), cert. denied, --- U.S. ----, 118 S.Ct. 1795, 140 L.Ed.2d 936 (1998); see Rust 500 U.S. at 191-92, 111 S.Ct. 1759 (although regulations were challenged on constitutional grounds, Court granted Chevron deference to regulations and addressed constitutional question on the merits); Republican Nat'l Comm. v. Federal Election Comm'n, 76 F.3d 400, 409 (D.C.Cir.1996) (court applied Chevron deference because it was able to "easily resolve ... First Amendment challenges [to the regulation] through the application of controlling precedent"). In short, "constitutional narrowing should displace Chevron only when the constitutional problems are truly 'grave' and never when it would effectively preclude all policy options because all possible interpretations raise constitutional problems." Williams, 115 F.3d at 663.

For the reasons that follow, I conclude neither of the constitutional challenges asserted by U.S. West is serious enough to warrant abandoning the traditional deference we grant agency interpretations under Chevron.

First Amendment challenge

US West contends the CPNI Order "violates the First Amendment by requiring that carriers secure prior affirmative consents from customers before using individually identifiable customer information to speak with their customers on an individualized basis about services beyond the 'categories' of telecommunications services to which the currently subscribe." US West's Opening Brief at 22. In other words, U.S West suggests the CPNI Order unduly limits its ability to engage in commercial speech with its existing customers regarding new products and services it may offer. US West also claims the CPNI Order "restricts the ability of carriers to share and use CPNI internally- to have different divisions, affiliates, and personnel within the same carrier communicate information to each other (i.e., to speak to each other), absent a prior affirmative consent from the customer." Id.

The problem with U.S. West's arguments is they are more appropriately aimed at the restrictions and requirements outlined in 222 rather than the approval method adopted in the CPNI Order. As outlined above, it is the statute, not the CPNI Order, that prohibits a carrier from using, disclosing, or permitting access to individually identifiable CPNI without first obtaining informed consent

from its customers. Yet U.S. West has not challenged the constitutionality of s 222, and this is not the proper forum for addressing such a challenge even if it was raised. [FN4] Thus, we must assume the restrictions and requirements outlined in the statute are constitutional. More specifically, we must assume the statute's restrictions on the use of CPNI, and its requirement that a carrier obtain customer approval prior to using, disclosing, or permitting access to individually identifiable CPNI, do not violate the First Amendment.

FN4. I have found no authority that would allow us, in the context of reviewing the CPNI Order, to pass on the constitutionality of s 222. Indeed, the most this court can do is strike the CPNI Order, which would have no effect on the continued validity of the statute.

Focusing strictly, then, on the portion of the CPNI Order challenged by U.S. West, I find nothing that warrants First Amendment scrutiny. As previously noted, the portion of the CPNI Order at issue in this case simply adopts from an extremely limited range of choices the particular method a carrier must use in obtaining customer approval. In my view, nothing about this selection method, viewed alone, impacts expressive activity. At bottom, the CPNI Order narrowly impacts a carrier's nonexpressive *1244 activity by requiring it to obtain express, rather than implied, customer approval. The CPNI Order does not, however, directly impact a carrier's expressive activity (by, for example, limiting the manner in which a carrier can speak), nor does it indirectly impact a carrier's expressive

activity in such a manner as to warrant First Amendment scrutiny. See generally Arcara v. Cloud Books, Inc., 478 U.S. 697, 702-07, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986) (discussing when First Amendment scrutiny will and will not be applied to a statute).

Although the majority attempts to explain how the CPNI Order impacts U.S. West's free speech rights, its analysis is frustratingly vague. [FN5] Indeed, the majority's discussion of this critical point contains no reference to the opt-in method selected by the FCC in the CPNI Order. Instead, the majority strays from the narrow scope of the CPNI Order and effectively takes into account the statutory restrictions on CPNI usage. Unfortunately, this error permeates not only the majority's threshold analysis of whether the CPNI Order implicates U.S. West's free speech rights, but its subsequent First Amendment analysis as well. [FN6]

FN5. Although the majority cites Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) in support of its limited analysis, that case is quite different from the instant action. At issue in Went For It was a Florida Bar rule that restricted attorneys' use of direct mail advertisements; in other words, a rule that directly impacted attorneys' commercial speech. Here, in contrast, the CPNI Order does not directly affect any form of expressive activity engaged in by U.S. West or other telecommunications carriers.

FN6. It is difficult to tell from the majority's opinion where its analysis of the CPNI Order ends and its analysis of the statute begins. For much of the opinion, the majority appears to be reviewing the constitutionality of s 222 rather than the CPNI Order.

In order to highlight the deficiencies in the majority's First Amendment analysis, I will assume, for purposes of argument only, that the CPNI Order impacts a carrier's free speech rights in a manner sufficient to warrant First Amendment scrutiny. I will also accept, for purposes of the following discussion, the majority's conclusions that the speech affected by the CPNI Order is commercial speech subject to First Amendment analysis under the test outlined in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). As noted by the majority, protected commercial speech (i.e., commercial speech that is neither misleading nor unlawful) may be regulated only if "the government can show that (1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest." Revo v. Disciplinary Bd. of the Supreme Ct. of New Mexico, 106 F.3d 929, 932 (10th Cir.) (outlining Central Hudson test).

A review of s 222 indicates Congress had a two-fold interest in regulating the disclosure of CPNI: the protection of consumer privacy and the promotion of fair competition among telecommunications carriers. In my view, Supreme Court and circuit precedent clearly supports the conclusion

that both of these interests are "substantial" for First Amendment purposes. See, e.g., Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 117 S.Ct. 1174, 1186, 137 L.Ed.2d 369 (1997) (concluding federal government had substantial interest in promoting fair competition in market for television programming); Went For It, 515 U.S. at 624-25, 115 S.Ct. 2371 (concluding Florida Bar Association had substantial interest in protecting privacy of personal injury victims by prohibiting invasive and unsolicited contact by lawyers); Van Bergen v. State of Minnesota, 59 F.3d 1541, 1555 (8th Cir.1995) (concluding government had substantial interest, motivated by protecting consumer privacy, in limiting use of unsolicited sales calls by auto dialing/announcing devices); Lanphere & Urbaniak v. *1245 State of Colorado, 21 F.3d 1508, 1514-15 (10th Cir.1994) (concluding government had substantial interest in protecting privacy of persons charged with misdemeanor traffic offenses and DUI); Curtis v. Thompson, 840 F.2d 1291, 1300 (7th Cir.1988) ("When the fundamental right to privacy clashes with the right of free expression, the interest in privacy does not play second fiddle when the speech is merely intended to propose a commercial transaction.").

Although the majority ultimately accepts Congress' interest in protecting customer privacy, it does so only after disparaging that interest and offering its own views concerning the advantages and disadvantages of protecting the privacy of consumer information. "Judges are not experts in the field [being regulated], and are not part of either political branch of the Government." Chevron, 467 U.S. at 865, 104 S.Ct. 2778. The majority also criticizes the FCC for failing to offer "a more empirical explanation

and justification" for the privacy interest. Majority Opinion at 21. The problem with this criticism is that, once again, the majority ignores the procedural context of this case. The privacy interest did not originate with the FCC or the CPNI Order; rather, it originated with Congress when it enacted the restrictions outlined in s 222. Precisely how the FCC could have or, for that matter, why it would have included in the administrative record "more empirical explanation and justification" for an interest that originated with Congress, and thus predated the administrative process in this case, is unclear. [FN7] As an administrative agency, and not an independent branch of government, the FCC was obligated to implement without question Congress' directive to require some form of customer approval.

> FN7. The majority holding presents a serious dilemma for the FCC. Because U.S. West has not challenged the constitutionality of s 222, carriers remain statutorily bound to obtain customer "approval" prior to using, disclosing, or granting access to individually identifiable CPNI. Further, the question of how this approval is to be obtained remains open. Thus, it would seem that, in light of the majority's opinion, the FCC must again attempt to formulate a method for obtaining such approval. It is unclear whether the FCC will now effectively be bound to adopt the opt-out method advocated by U.S. West and the majority.

Even more disturbingly, the majority rejects outright any Congressional interest in promoting competition.

Although I agree protection of customer privacy is perhaps the dominant purpose of s 222, it is impossible to ignore the fact that s 222 was enacted as part of the Telecommunications Act of 1996, the entire purpose of which was "[t]o promote competition ... in order to secure lower prices and higher quality services for American telecommunications consumers." Pub.L. No. 104-104, 110 Stat. 56, 56 (1996); see In re Graven, 936 F.2d 378, 385 (8th Cir.1991) (when interpreting statute, court looks not only to its express language, but also to overall purpose of act of which it is a part). Indeed, the notion that promotion of competition was one of Congress' purposes in enacting s 222 is entirely consistent with the plain language of the statute itself. By restricting carriers' usage of CPNI, s 222 helps diminish anticompetitive barriers in the telecommunications market by requiring carriers (both large and small) to rely on methods other than analysis of existing CPNI to promote their products, and thereby reduces the possibility that a carrier will easily convert its existing customers for a particular product or service into customers for its new products or services.

Turning to the next prong of Central Hudson, I conclude the restrictions outlined in s 222 directly and materially advance Congress' twin interests of protecting customer privacy and promoting competition. By preventing a carrier from using, disclosing, or permitting access to individually identifiable CPNI without customer approval, s 222 directly promotes the goal of protecting customer privacy. Indeed, s 222 arguably promotes the First Amendment rights of consumers by allowing them to call *1246 whom they wish when they wish without fear

that their calling records will be disclosed to others. Likewise, s 222's limitations on the use of CPNI appear to promote competition by "leveling the playing field" among carriers offering new types of telecommunications markets. For example, s 222 makes it more difficult for a large long-distance carrier (such as AT & T) to develop an immediate monopoly in a new telecommunications market (e.g., PCS) by limiting its use of CPNI obtained from its long-distance customers.

In addressing this prong of Central Hudson, the majority once again ignores the procedural context of the case and criticizes the FCC for "present [ing] no evidence showing the harm to either privacy or competition is real." Majority Opinion at 25. As stated above, because the two interests originated with Congress and thus predated the administrative process that led to the issuance of the CPNI Order, it is unclear precisely what the majority believes the FCC should have done to bolster the administrative record. Indeed, I submit it was wholly unnecessary for the FCC to collect or consider any evidence regarding these two Congressional interests. Instead, the FCC's much more narrow responsibility, which I believe it reasonably fulfilled, was to fill in the gaps left by Congress when it enacted s 222.

Finally, I turn to the last prong of Central Hudson, which asks whether the restrictions at issue are narrowly tailored to achieving the government's interests. In Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), the Supreme Court emphasized the "fit" between the restrictions and the

governmental interests need not be "necessarily perfect, but reasonable." In other words, the restrictions do not have to represent "the single best disposition but one whose scope is in proportion to the interest served." Id. Before addressing the CPNI Order, I again note U.S. West has not challenged s 222, and has thus effectively conceded the requirement of customer approval is narrowly tailored to achieving the interests of privacy and competition. As for the CPNI Order itself, I am convinced it is also narrowly tailored to achieving these same interests. The administrative record convincingly demonstrates that, of the limited options available to the FCC, the opt-in method of obtaining customer approval was the most reasonable solution. As the FCC concluded in the CPNI Order, the method of implied approval suggested by U.S. West (i.e., the opt-out method) did not ensure that the Congressional goal of informed customer consent would be satisfied. As for the two express methods of approval available to it, the FCC chose the least restrictive method available. More specifically, the FCC rejected the express written approval method as too restrictive, and adopted the opt-in method which allows carriers to obtain express written, oral, or electronic approval from customers. Ultimately, I conclude the FCC's selection satisfies the last Central Hudson prong because it represents a "carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition." Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (internal quotation marks omitted).

The majority, focusing at this point on the CPNI Order rather than the statute, concludes the FCC failed to

adequately consider the opt-out method, which the majority characterizes as "an obvious and substantially less restrictive alternative" than the opt-in method. Majority Opinion at 29. Notably, however, the majority fails to explain why, in its view, the opt-out method is substantially less restrictive. Presumably, the majority is relying on the fact that the opt-out method typically results in a higher "approval" rate than the opt-in method. Were mere "approval" percentages the only factor relevant to our discussion, the majority would perhaps be correct. As the FCC persuasively concluded in the CPNI Order, however, the opt-out method simply does not comply with s 222's requirement of informed consent. *1247 In particular, the opt-out method, unlike the opt-in method, does not guarantee that a customer will make an informed decision about usage of his or her individually identifiable CPNI. To the contrary, the opt-out method creates the very real possibility of "uninformed" customer approval. In the end, I reiterate my point that the opt-in method selected by the FCC is the only method of obtaining approval that serves the governmental interests at issue while simultaneously complying with the express requirement of the statute (i.e., obtaining informed customer consent).

In summary, as U.S. West has not challenged the constitutionality of s 222, there is no need to subject the CPNI Order to First Amendment scrutiny. Even assuming, arguendo, such scrutiny is required, I conclude the CPNI Order does not violate U.S. West's First Amendment rights. In my view, U.S. West has not posed a "grave" First Amendment challenge to the CPNI Order.

Fifth Amendment challenge

U.S. West also contends the FCC's restrictions on the disclosure of CPNI are so severe they constitute a regulatory taking of property without just compensation, in violation of the Takings Clause of the Fifth Amendment. As with its First Amendment claim, U.S. West is again, in my view, aiming at the statutory restrictions rather than the narrow portion of the CPNI Order at issue in this case. Even assuming, for purposes of argument, that U.S. West's "takings" argument is focused solely on the CPNI Order, I find no merit to it. [FN8]

FN8. I find U.S. West's takings claim inconsistent with its First Amendment claim. In particular, the more accessible CPNI is to various employees within the company, the less likely it is that CPNI will be deemed a trade secret and thereby be entitled to protection under the Fifth Amendment's Taking Clause. Moreover, if CPNI is disclosed to outside companies, it would clearly lose any protection as a trade secret and would not be considered property protectable under the Fifth Amendment.

The Fifth Amendment provides, in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. "The purpose of the Fifth Amendment is to prevent the '[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " 767 Third Avenue Assoc. v. United States, 48 F.3d 1575, 1580 (Fed.Cir.1995) (quoting Penn

Central Transp. Co. v. New York City, 438 U.S. 104, 123, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)). In addressing U.S. West's takings argument, the threshold question is whether CPNI constitutes "property" for purposes of the Takings Clause. US West gives short shrift to this issue, arguing the decision in Ruckelshaus v. Monsanto Co., 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984), establishes that CPNI is protectable property for purposes of the Takings Clause. In Monsanto, plaintiff Monsanto, a pesticide manufacturer doing business in Missouri, filed suit challenging certain amendments to the Federal Insecticide, ungicide, and Rodenticide Act (FIFRA), 7 U.S.C. s 136 et seq., requiring it to disclose to the EPA various health, environmental, and safety data related to its products. In addressing Monsanto's assertion that the challenged regulations constituted a takings under the Fifth Amendment, the Court held "that to the extent that Monsantoha[d] an interest in its health, safety, and environmental data cognizable as a trade secret property right under Missouri law, that property right [wa]s protected by the Taking Clause of the Fifth Amendment." 467 U.S. at 1003-04, 104 S.Ct. 2862.

Although Monsanto certainly sets the stage for treatment of CPNI as property for Fifth Amendment purposes, U.S. West has failed to take the requisite step of demonstrating that CPNI qualifies as trade secret property, or any other kind of protectable property interest, under state law. Therefore, there is no basis for concluding *1248 U.S. West has presented a "grave" or "serious" Fifth Amendment challenge to the CPNI Order.

IV.

In conclusion, I view U.S. West's petition for review as little more than a run-of-the-mill attack on an agency order "clothed by ingenious argument in the garb" of First and Fifth Amendment issues. Zemel v. Rusk, 381 U.S. 1, 16- 17, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965). Because there is no merit to those constitutional arguments, and because the FCC's CPNI Order is an entirely reasonable interpretation of 47 U.S.C. s 222, I would deny U.S. West's petition for review and affirm the CPNI Order.

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)
	)
Implementation of the	)
Telecommunications Act of 1996:	)
	)
Telecommunications Carriers' Use	)
of Customer Proprietary Network	)
Information and Other	)
Customer Information	)
	)
Implementation of the Non-Accounting	)
Safeguards of Sections 271 and 272 of the	)
Communications Act of 1934, as Amended	)
	)

CC Docket No. 96-115
CC Docket No. 96-149

SECOND REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: February 19, 1998
Released: February 26, 1998

Comment Date: March 30, 1998
Reply Comment Date: April 14, 1998

By the Commission: Commissioner Ness approving in part; dissenting in part and issuing a statement.

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In passing the Telecommunications Act of 1996 (1996 Act),[1] Congress sought to establish a new "pro-competitive, deregulatory national policy framework"[2] that would replace the statutory and regulatory limitations on competition within and between markets. Congress recognized, however, that the new competitive market forces and technology ushered in by the 1996 Act had the potential to threaten consumer privacy interests. Congress, therefore, enacted section 222 to prevent consumer privacy protections from being inadvertently swept away along with the prior limits on competition.[3] Section 222 establishes a new statutory framework governing carrier use and disclosure of customer proprietary network information (CPNI) and other customer information obtained by carriers in their provision of telecommunications services.

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act) (codified at 47 U.S.C. § § 151 *et seq.*). Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act."

[2] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 1 (1996) (Joint Explanatory Statement).

[3] Representative Markey, the original sponsor of the "Telephone Consumer Privacy Protection Act of 1993," which was the first iteration of what ultimately evolved into section 222, explained: "As recent events have made clear, we are undoubtedly in a full-fledged technological revolution. This revolution promises exciting new services and products that will change the way we live, work, and play . . . . If adequate safeguards are not in place to protect consumers, however, the same technology that serves to empower individuals can

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2. Section 222 sets forth three categories of customer information to which different privacy protections and carrier obligations apply -- individually identifiable CPNI, aggregate customer information, and subscriber list information.[4] CPNI includes information that is extremely personal to customers as well as commercially valuable to carriers, such as to whom, where and when a customer places a call, as well as the types of service offerings to which the customer subscribes and the extent the service is used.[5] Aggregate customer and subscriber list information, unlike individually identifiable CPNI, involve customer information that is not private or sensitive, but like CPNI, is nevertheless valuable to competitors. Aggregate customer

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also imperil them by fostering and abetting invasions of personal privacy. The legislation I am introducing today will ensure that the fundamental privacy rights of each American will be protected even as this new era of communications becomes ever more sophisticated and ubiquitously deployed." Extension of Remarks of Edward J. Markey, 139 Cong. Rec. E2745-01.

[4] Sections 222(a) and (b) also establish obligations and restrictions in connection with carrier proprietary information. The nature of these obligations are not addressed in this order, but rather are the subject of the accompanying *Further Notice of Proposed Rulemaking*. *See* discussion *infra* Part IX.

[5] Section 222(f)(1) defines CPNI as: "(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information." 47 U.S.C. § 222(f)(1). *See infra* generally Part IV, for discussion of carriers' use of CPNI for marketing purposes.

information is expressly defined as "collective data that relates to a group or category of services or customers, *from which individual customer identities and characteristics have been removed.*"[6] Subscriber list information, although consisting of individually identifiable information, is defined in terms of *public*, not private, information, including the "*listed* names, numbers, addresses, or classifications . . . that the carrier or an affiliate has *published, caused to be published, or accepted for publication* in any directory format."[7]

3. In contrast to other provisions of the 1996 Act that seek primarily to "[open] all telecommunications markets to competition,"[8] and mandate competitive access to facilities and services, the CPNI regulations in section 222 are largely consumer protection provisions that establish restrictions on carrier use and disclosure of personal customer information. With section 222, Congress expressly directs a balance of "both competitive and consumer privacy interests with respect to CPNI."[9] Congress' new balance, and privacy concern, are evidenced by the comprehensive statutory design, which expressly recognizes the duty of *all* carriers to

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6 47 U.S.C. § 222(f)(2)(emphasis added). *See infra* generally Part VI, for discussion of carriers' use of aggregate information for marketing purposes, including, for example, in developing new service offerings for its existing customers as well as for creating customer profiles that can be useful in targeting new customers.

7 47 U.S.C. § 222(f)(3)(emphasis added). Subscriber list information is critically important to the development of specialized and competitive directory publications.

8 Joint Explanatory Statement at 1.

9 *Id.* at 205.

protect customer information,[10] and embodies the principle that customers must be able to control information they view as sensitive and personal from use, disclosure, and access by carriers.[11] Where information is not sensitive,[12] or where the customer so directs,[13] the statute permits the free flow or dissemination of information beyond the existing customer-carrier relationship. Indeed, in the provisions governing use of aggregate customer and subscriber list information, sections 222(c)(3) and 222(e) respectively, where privacy of sensitive information is by definition *not* at stake, Congress expressly *required* carriers to provide such information to third parties on nondiscriminatory terms and conditions.[14] Thus, although privacy and competitive

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[10] 47 U.S.C. § 222(a)(establishes general duty, titled "Privacy of Customer Information").

[11] *See* discussion *infra* Part IV.B.2.b (section 222(c)(1), titled "Confidentiality of Customer Proprietary Network Information," embodies principle of customer control).

[12] *See, e.g.*, section 222(c)(3)(involving aggregate customer information, defined as non-personal information); section 222(e)(involving subscriber list information, defined as published information).

[13] *See* discussion *infra* Part V.B.2. Under section 222(c)(1) carriers can use, disclose or permit access to CPNI upon the "approval" of the customer. 47 U.S.C. § 222(c)(1). Under section 222(c)(2) carriers "shall disclose [CPNI], upon affirmative written request by the customer, to any person designated by the customer." 47 U.S.C. § 222(c)(2).

[14] Section 222(c)(3) provides in pertinent part: "A local exchange carrier may use, disclose or permit access to aggregate customer information other than for purposes described in paragraph (1) *only* if it provides such aggregate information *to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request therefor.*" 47 U.S.C. § 222(c)(3)(emphasis

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concerns can be at odds, the balance struck by Congress aligns these interests for the benefit of the consumer. This is so because, where customer information is not sensitive, the customer's interest rests more in choosing service with respect to a variety of competitors, thus necessitating competitive access to the information, than in prohibiting the sharing of information.

4. In this *Second Report and Order*, we promulgate regulations to implement the statutory obligations of section 222. We also review our existing regulatory framework governing CPNI, and resolve CPNI issues raised in other proceedings that have been deferred to this proceeding, including obligations in connection with sections 272 and 274 of the 1996 Act. More specifically, for the reasons discussed herein, we modify our rules and procedures regarding CPNI and implement section 222 as follows:

(a) We permit carriers to use CPNI, without customer approval, to market offerings that are related to, but limited by, the customer's existing service relationship with their carrier.[15]

(b) Before carriers may use CPNI to market service outside the customer's existing service relationship, we

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added). Section 222(e) provides that "notwithstanding subsections (b), (c), and (d), a telecommunications carrier that provides telephone exchange service *shall provide* subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, *under nondiscriminatory and reasonable rates, terms and conditions, to any person upon request* for the purpose of publishing directories in any format." 47 U.S.C. § 222(e)(emphasis added).

15 *See* discussion *infra* Part IV.B.

require that carriers obtain express customer approval.[16] Such express approval may be written, oral, or electronic.[17] In order to ensure that customers are informed of their statutory rights before granting approval, we further require carriers to provide a one-time notification of customers' CPNI rights prior to any solicitation for approval.[18]

(c) We eliminate the *Computer III* CPNI framework, as well as sections 22.903(f) and 64.702(d)(3) of our rules, in light of the comprehensive regulatory scheme Congress established in section 222.[19]

(d) We reconcile section 222 with sections 272 and 274, and interpret the latter two provisions to impose no additional CPNI requirements on the Bell Operating Companies (BOCs).[20]

5. Finally, in a *Further Notice of Proposed Rulemaking* (*Further Notice*) we seek additional comment on three issues involving carrier duties and obligations established under sections 222(a) and (b) of the 1996 Act.[21] In

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16 *See* discussion *infra* Part V.B.

17 *See* discussion *infra* Part V.C.

18 *See* discussion *infra* Parts V.F and V.G.

19 *See* discussion *infra* Part VIII.

20 *See* discussion *infra* Part VII.

21 Section 222(a) states that: "[E]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier." 47 U.S.C. § 222(a). Section 222(b) states that: "[A] telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information

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particular, we seek further comment on (a) the customer's right to restrict carrier use of CPNI for all marketing purposes;[22] (b) the appropriate protections for carrier information and additional enforcement mechanisms we may apply;[23] and (c) the foreign storage of, and access to, domestic CPNI.[24]

II. BACKGROUND

6. In response to various informal requests for guidance from the telecommunications industry regarding the obligation of carriers under new section 222,[25] the

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for its own marketing efforts." 47 U.S.C. § 222(b).

22 *See* discussion *infra* Part IX.A.

23 *See* discussion *infra* Part IX.B.

24 *See* discussion *infra* Part IX.C.

25 *See, e.g.*, Letter from Mary McDermott, United States Telephone Association (USTA) to Regina Keeney, Chief of the Common Carrier Bureau, FCC, on behalf of USTA, the National Rural Telephone Association (NRTA), the National Telephone Cooperative Association (NTCA), and the Organization for the Promotion & Advancement of Small Telecommunications Companies (OPASTCO), dated February 14, 1996 (Association Letter). *See also* Petition of the NYNEX Telephone Companies for a Declaratory Ruling as to the Interpretation of Section 222 of the Communications Act (filed Mar. 5, 1996) (NYNEX Petition); Letter from Lawrence E. Sargeant, Vice President - Federal Regulatory, U S WEST, to Regina M. Keeney, Chief, Common Carrier Bureau, FCC, filed March 27, 1996 (disagreeing with NYNEX's interpretation of CPNI provisions). The NYNEX Petition sought a declaratory ruling with regard to the meaning of the term "telecommunications service" as used in section 222(c)(1). NYNEX specifically argued that intraLATA service should be distinguished from interLATA service for the purpose of applying section 222. U S WEST, in a letter response to the NYNEX petition,

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Commission released a *Notice of Proposed Rulemaking*[26] on May 17, 1996. The *Notice*, among other things, sought comment on: (1) the scope of the phrase "telecommunications service," as it is used in section 222(c)(1), which permits carriers to use, disclose, or permit access to individually identifiable CPNI without obtaining customer approval;[27] (2) the requirements for customer approval;[28] and (3) whether the Commission's existing CPNI requirements should be amended in light of section 222.[29]

7. Prior to the 1996 Act, the Commission had established CPNI requirements applicable to the enhanced services[30] operations of AT&T, the BOCs, and GTE, and

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expressed disagreement with NYNEX's interpretation of the CPNI provisions of the statute and argued that section 222 supported the broad use of CPNI in a carrier's provision of telecommunications services.

26 *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, 11 FCC Rcd 12513 (1996) (*Notice*).

27 *Notice* at 12523-26, ¶ ¶ 20-26.

28 *Notice* at 12526-28, ¶ ¶ 27-33.

29 *Notice* at 12529-31, ¶ ¶ 38-42.

30 "Enhanced services" generally include such services as voice mail, electronic mail, electronic store-and forward, fax store-and-forward, data processing, and gateways to on-line databases. Prior to the 1996 Act, enhanced services were defined as services "offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction

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the CPE operations of AT&T and the BOCs, in the *Computer II*,[31] *Computer III*,[32] *GTE ONA*,[33] and *BOC CPE*

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with stored information." 47 C.F.R. § 64.702(a); *see also North American Telecommunications Association Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services and Customer Premises Equipment*, 101 FCC 2d 349 (1985), *recon.*, 3 FCC Rcd 4385 (1988).

[31] *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Computer II*), Docket No. 20828, 77 FCC 2d 384 (1980) (*Final Order*), *recon.*, 84 FCC 2d 50 (1980) (*Reconsideration Order*), *further recon.*, 88 FCC 2d 512 (1981) (*Further Reconsideration Order*), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[32] *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Computer III*), CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Recon. Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Recon. Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Recon. Order*); *Phase I Order* and *Phase I Recon. Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Recon. Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Recon. Order*); *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III* Remand Proceeding, CC Docket No. 90-368, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *BOC Safeguards Order vacated in part and remanded sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 115 S. Ct. 1427 (1995) (referred to collectively as the *Computer III* proceeding); *Computer III Further*

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Relief[34] proceedings. The Commission recognized in the *Notice* that it had adopted these CPNI requirements, together with other nonstructural safeguards, to protect independent enhanced services providers and CPE suppliers from discrimination by AT&T, the BOCs, and GTE.[35] The *Notice* stated that the Commission's existing CPNI requirements were intended to prohibit AT&T, the BOCs,

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Remand Proceedings:Bell Operating Company Provision of Enhanced Services, CC Docket 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (*Computer III Further Remand Notice*), Further Notice of Proposed Rulemaking, FCC 98-8 (rel. Jan. 29, 1998) (*Computer III Further Remand Further Notice*). *See also Filing and Review of Open Network Architecture Plans,* CC Docket 88-2, Phase I, 4 FCC Rcd 1, 209-10, ¶ ¶ 398-99 (1988) (*BOC ONA Order*); *In the Matter of Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Co.*, CC Docket No. 85-26, Memorandum Opinion and Order, 102 FCC 2d 655 (1985) *(AT&T Structural Relief Order), recon., Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Co.*, CC Docket No. 85-26, Memorandum Opinion and Order on Reconsideration, 104 FCC 2d 739, 768 (1986) (*AT&T Structural Relief Reconsideration Order).*

[33] *In the Matter of Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corp.*, CC Docket No. 92-256, Report and Order, 9 FCC Rcd 4922, 4944-45, ¶ 45 (1994) (*GTE Safeguards Order)*; *Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corp.*, CC Docket No. 92-256, Memorandum Opinion and Order, 11 FCC Rcd 1388, 1419-25, ¶ ¶ 73-86 (1995) (*GTE ONA Order*).

[34] *In the Matter of Furnishing of Customer Premises Equipment by Bell Operating Telephone Companies and the Independent Telephone Companies*, CC Docket No. 86-79, Report and Order, 2 FCC Rcd 143 (1987) (*BOC CPE Relief Order*), *recon. on other grounds*, 3 FCC Rcd 22 (1987); *aff'd*, 883 F.2d 104 (D.C. Cir. 1989).

[35] *Notice* at 12516, ¶ 4.

and GTE from using CPNI obtained from their provision of regulated services to gain a competitive advantage in the unregulated CPE and enhanced services markets.[36] The *Notice* further stated that the existing CPNI requirements also were intended to protect legitimate customer expectations of confidentiality regarding individually identifiable information.[37] The Commission concluded in the *Notice* that existing CPNI requirements would remain in effect, pending the outcome of this rulemaking, to the extent that they do not conflict with section 222.[38] On November 13, 1996, the Common Carrier Bureau (Bureau) waived the annual CPNI notification requirement for multi-line business customers that had been imposed on AT&T, the BOCs, and GTE under our pre-existing CPNI framework, pending our action in this proceeding.[39]

8. On August 7, 1996, the Commission released the *First Report and Order* in the CPNI proceeding.[40] In the *First Report and Order*, the Commission affirmed its

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36 *Notice* at 12516, 12530, ¶ ¶ 4, 40.

37 *Notice* at 12516, ¶ 4.

38 *Notice* at 12515-16, 12529, ¶ ¶ 3, 38.

39 *Petition for Exemption from Customer Proprietary Network Information Notification Requirements*, Order, CCB Pol 96-20, DA 96-1878, 12 FCC Rcd 15134. On December 16, 1997, the Policy and Program Planning Division waived this requirement for 1997. *In the Matter of Waiver from Customer Proprietary Network Information Notification Requirements*, CCB Pol 97-13, DA 97-2599 (rel. Dec. 16, 1997).

40 *In the Matter of the Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information; Use of Data Regarding Alarm Monitoring Service Providers*, CC Docket No. 96-115, Report and Order, 11 FCC Rcd 9553 (1996).

tentative conclusion that, even if a carrier has received customer approval to use CPNI pursuant to section 222(c)(1), such approval does not extend to the carrier's use of CPNI involving the occurrence of calls received by alarm monitoring service providers,[41] pursuant to the ban on such use in section 275(d).[42] Noting that section 222 sets forth limitations on the ability of telecommunications carriers, their affiliates, and unaffiliated parties to obtain access to CPNI, the Commission further concluded that it was not necessary to bar completely certain of these entities from accessing CPNI simply because they market alarm monitoring services.[43] The Commission deferred deciding the issue of whether any restrictions on access to CPNI were necessary to effectuate the prohibition contained in section 275(d).[44]

9. On December 24, 1996, the Commission released the *Non-Accounting Safeguards Order*, which adopted rules and policies governing the BOCs' provision of certain services through section 272 affiliates.[45] In that order, the

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41 For example, LEC personnel may not use information regarding the occurrence or content of calls received by alarm monitoring service providers, even with customer approval under section 222(c)(1), for purposes of marketing alarm monitoring services.

42 11 FCC Rcd at 9554, ¶ 3.

43 *Id.* at 9558, ¶ 11.

44 *Id.*

45 *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), *recon. pending*, Order on Reconsideration, 12 FCC Rcd 2297 (1997), Second Report and Order,

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Commission concluded that the nondiscrimination provisions of section 272(c)(1) govern the BOCs' use of CPNI and that the BOCs must comply with the requirements of both sections 222 and 272(c)(1).[46] The Commission deferred to this proceeding, however, all other issues concerning the interplay between those provisions.[47] On February 7, 1997, the Commission released the *Electronic Publishing Order*, which adopted policies and rules governing, among other things, the BOCs' provision of electronic publishing under section 274.[48] In that order, the Commission likewise deferred to this proceeding all CPNI-related issues involved in the BOCs' marketing of electronic publishing services.[49] In light of the Commission's determinations in the *Non-Accounting Safeguards* and *Electronic Publishing* orders, the Bureau issued a *Public Notice* on February 20, 1997, seeking to supplement the record in this proceeding on specific issues relating to the subjects previously noticed and their interplay with sections 272 and 274.[50] Finally, the Commission released the *CMRS*

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12 FCC Rcd 15756 (1997), *aff'd sub nom. Bell Atlantic Telephone Companies, et al. v. FCC, et al.*, No. 97-1432, 1997 WL 783993 (D.C. Cir. 1997).

46 *Id.* at 22010, ¶ 222.

47 *Id.*

48 *In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, Report and Order, 12 FCC Rcd 5361 (1997) (*Electronic Publishing Order*), *recon. pending*.

49 *Id.* at 5432, ¶ 169.

50 *Common Carrier Bureau Seeks Further Comment on Specific Questions in CPNI Rulemaking*, CC Docket No. 96-115, Public Notice, 12 FCC Rcd 3011 (1997) (*Public Notice*).

Safeguards Order on October 3, 1997, in which it eliminated section 22.903 of the rules generally, but expressly retained subsection 22.903(f), regarding the BOCs' sharing of CPNI with cellular affiliates, pending the outcome of this proceeding.[51]

10. In this *Second Report and Order*, we address the scope and meaning of section 222, as well as the issues deferred to this proceeding. We will consider subsequently, in a separate order, the meaning and scope of section 222(e) of the 1996 Act, relating to the disclosure of subscriber list information by local exchange carriers.[52] We note that LECs became obligated to disclose subscriber list information to directory publishers on nondiscriminatory rates, terms, and conditions, upon passage of the Act. Accordingly, the LEC's duty exists presently, independent of any implementing rules we might promulgate in the future, and a failure to discharge this duty may well, depending on the circumstances, constitute both a violation of section 222(e) and an unreasonable practice in violation of section 201(b).[53]

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51 *In the Matter of Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, WT Docket No. 96-162, Report and Order, 12 FCC Rcd 15668 (1997) (*CMRS Safeguards Order*).

52 47 U.S.C. § 222(e).

53 47 U.S.C. § 201(b).

IV. CARRIER'S RIGHT TO USE CPNI WITHOUT CUSTOMER APPROVAL

A. Overview

21. Section 222(c)(1) and section 222(d) set forth the circumstances under which a carrier may use, disclose, or permit access to CPNI without customer approval. Specifically, section 222(c)(1) provides that a telecommunications carrier that receives or obtains CPNI by virtue of its "provision of *a telecommunications service* shall *only* use, disclose, or permit access to individually identifiable [CPNI] in its provision of (A) *the telecommunications service* from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories."[54] Section 222(d) provides:

> [n]othing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to [CPNI] obtained from its customers, either directly or indirectly through its agents -- (1) to initiate, render, bill, and collect for telecommunications services; (2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services; or (3) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer

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54 47 U.S.C. § 222(c)(1) (emphasis added).

approves of the use of such information to provide such service.[55]

22. Numerous parties comment on the proper interpretation of section 222(c)(1) because this provision governs, among other things, the scope of a carrier's right to use CPNI for customer retention and marketing purposes, without having to seek some form of customer approval. Most carriers acknowledge that they view CPNI as an important asset of their business, and many state that they hope to use CPNI as an integral part of their future marketing plans.[56] Indeed, as competition grows and the number of firms competing for consumer attention increases, CPNI becomes a powerful resource for identifying potential customers and tailoring marketing strategies to maximize customer response.[57] Accordingly, a broad interpretation of the scope of section 222(c)(1) would afford carriers the opportunity to use, disclose, or permit access to CPNI expansively. A narrow interpretation, conversely, would restrict the use carriers can make of CPNI absent customer approval.

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55 47 U.S.C. § 222(d).

56 *See, e.g.*, PacTel *ex parte* (filed Nov. 22, 1996) at 9; SBC *ex parte* (filed Sept. 27, 1996) at 3; U S WEST *ex parte* (filed Oct. 17, 1996) at 8.

57 NTIA *ex parte* (filed Apr. 14, 1997) at att. at 6 (*Privacy and the NII: Safeguarding Telecommunications-Related Personal Information*) (*NTIA Privacy Report*). The *NTIA Privacy Report* further observes that, as competition squeezes profit margins, carriers have an incentive to sell their CPNI to supplement their revenue. *Id.* at 6-7.

23. We conclude that the general framework established under section 222, considered as a whole, carves a limited exception in section 222(c)(1) for carrier use, disclosure, and permission of access to sensitive customer information. Specifically, sections 222(c)(1)(A) and (B), as well as the narrow exceptions in section 222(d), represent the only instances where customer approval for a carrier to use, disclose, or permit access to personal customer information is not required. We believe that the language of section 222(c)(1)(A) and (B) reflects Congress' judgment that customer approval for carriers to use, disclose, and permit access to CPNI can be *inferred* in the context of an existing customer-carrier relationship. This is so because the customer is aware that its carrier has access to CPNI, and, through subscription to the carrier's service, has implicitly approved the carrier's use of CPNI within that existing relationship.

24. The language also suggests, however, that the carrier's right under section 222(c)(1)(A) and (B) is a limited one, in that the carrier "shall *only*" use, disclose, or permit access to CPNI "in the *provision* of" the telecommunications service from which such CPNI is derived or services necessary to, or used in, such telecommunications service.[58] Indeed, insofar as the customer consent in sections 222(c)(1)(A) and (B) is inferred rather than based on express customer direction, we conclude that Congress intended that implied customer approval be restricted solely to what customers reasonably understand their telecommunications service to include. This customer understanding, in turn, is manifested in the complete service

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[58] 47 U.S.C. § 222(c)(1)(emphasis added).

offering to which the customer subscribes from a carrier. We are persuaded that customers expect that CPNI generated from their entire service will be used by their carrier to market improved service within the parameters of the customer-carrier relationship.[59] Although most customers presently obtain their service from different carriers in terms of traditional categories of offerings -- local, interexchange, and commercial mobile radio services (CMRS) -- with the likely advent of integrated and bundled service packages, the "total service approach" accommodates any future changes in customer subscriptions to integrated service.[60]

25. For the reasons described below, we believe that the total service approach best represents the scope of "the telecommunications service from which the CPNI is derived." Under the total service approach, the customer's implied approval is limited to the parameters of the customer's existing service, and is neither extended to permit CPNI use in marketing all of a carrier's telecommunications services regardless of whether subscribed to by the customer, nor narrowed to permit use only in providing a discrete service feature. In this way, the

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[59] As discussed more fully in the following paragraphs, our judgment concerning what customers expect is supported by our historical understanding of customer preferences as well as the present record. Moreover, we believe that it is in the public interest to implement section 222 and clarify carrier CPNI obligations thereunder at this time. To the extent, however, that we are persuaded in the future that our view no longer manifests such customer expectations, and therefore would not appropriately reflect the scope of section 222(c)(1)(A), we could, and would revisit our conclusions.

[60] *See* discussion *infra* ¶.

total service approach appropriately furthers Congress' intent to balance privacy and competitive concerns, and maximize customer control over carrier use of CPNI.

26. Also, as explained below, with respect to section 222(c)(1)(B), we further conclude that a carrier may use, disclose, or permit access to CPNI without customer approval for the provision of inside wiring installation, maintenance, and repair services because they are "services necessary to, or used in, the provision of such telecommunications service" under section 222(c)(1)(B). In contrast, CPE and information services are not "services necessary to, or used in, the provision of such telecommunications service" within the meaning of section 222(c)(1)(B).

B. Scope of a Carrier's Right Pursuant to Section 222(c)(1)(A): the "Total Service Approach"

1. Background

27. In the *Notice*, the Commission tentatively concluded that section 222(c)(1)(A) should be interpreted as "distinguishing among telecommunications services based on traditional service distinctions," specifically, local, interexchange, and CMRS.[61] Thus, for example, a local exchange carrier could use local service CPNI to market local service offerings, but could not use local service CPNI to target customers to market long distance offerings or CMRS, absent customer approval. The Commission further tentatively concluded that short-haul toll should be treated as a local telecommunications service when provided by a LEC, and as an interexchange telecommunications service when provided by an interexchange carrier (IXC).[62] The Commission sought comment on these and other possible distinctions among telecommunications services, the scope of the term "telecommunications service," and the costs and benefits of any proposed interpretation, including the interpretation's impact on competitive and customer privacy interests.[63] The Commission also sought comment on the impact of changes in telecommunications technology and regulation and on whether and when technological and market developments may require the Commission to revisit the issue of telecommunications service distinctions.[64]

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61 *Notice* at 12524, ¶ 22.

62 *Id.* The Commission noted that, for purposes of the *Notice*, "with respect to the BOCs, the term 'short-haul toll' should be interpreted as 'intraLATA toll,' and the term 'interexchange' should be

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28. Commenters recognize that the language of section 222(c)(1)(A) is not clear, and propose at least five different interpretations. First, several parties urge us to interpret section 222(c)(1)(A) as limited to each discrete offering or feature of service subscribed to by a customer.[65] This proposal, which we refer to as the "discrete offering approach," assumes that customers do not expect or understand, for example, that their local exchange carrier would use local CPNI to market the carrier's call waiting feature to them, absent their approval. Second, a number of parties urge us to adopt our tentative conclusion and define the scope of "the telecommunications service from which such [CPNI] is derived" according to the three traditional service distinctions -- local, interexchange, and CMRS.[66]

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interpreted as 'interLATA.'" *Id.* at 12524, ¶ 22 n.57.

63 *Id.* at 12524-25, ¶ ¶ 22-25.

64 *Id.* at 12525, ¶ 23.

65 Ad Hoc Reply at 3-4; CPSR Reply at 6-7; NTIA Further Reply at 9-14; Texas Commission Comments at 8. *See also* CFA Comments at 4 (supports discrete offering approach, but alternatively suggests that three category approach may also be adequate minimum standard).

66 AICC Comments at 9; AirTouch Comments at 2-4 & n.2; California Commission Comments at 7; California Commission Reply at 5-6; CPI Reply at 7-8 & n.5; CompTel at 6; CompTel Reply at 2-4; Excel Comments at 3; Frontier Comments at 4; LDDS WorldCom Comments at 7-8; LDDS WorldCom Reply at 2-4; MobileMedia Reply at 3; PageNet Comments at 2; Sprint Comments at 2-3; Sprint Reply at 8-9; TRA Comments at 15; TRA Reply at 3-4, 10-11 & n.23; Washington Commission Comments at 4; *see also* Ameritech Comments at 3-4 (supports three category approach if CPNI can be used by any affiliate of the carrier); Arch Comments at 3-4, 6 (supports categories but proposes two CMRS categories -- broadband and

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We refer to this as the "three category approach." Under this approach, for example, a customer's local exchange carrier would be able to use local service CPNI to market a call waiting feature to them, as one of many offerings that make up local service, but would not be able to use CPNI to market long distance or CMRS offerings, absent customer approval.[67]

29. Third, a variation on the three category approach is what we refer to as the "two category approach," where local and interexchange services constitute separate service categories, but CMRS, like short-haul toll, "floats" between them.[68] Under this approach, for example, an IXC would be

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narrowband); CFA Comments at 4-5 (supports the three category approach as an alternative to the discrete offering approach; argues that the three category approach, although too broad, is minimum standard necessary); SBT Comments at 1-2 (argues that Commission should forbear from applying three category interpretation to small businesses). We note that NYNEX and PacTel also deemed the three category approach acceptable in their initial pleadings in this docket, although NYNEX would include short-haul toll only in the local service category. NYNEX Comments at 8-10 & n.3; NYNEX Reply at 4 & n.7 (also supporting single category approach); PacTel Comments at 3-4; PacTel *ex parte* (filed Nov. 22, 1996) at 7; PacTel *ex parte* (filed Jan. 17, 1997) at 13. Since their respective mergers, which occurred after their comments were received in this proceeding, however, Bell Atlantic/NYNEX and SBC/PacTel now support the "single category approach." *See, e.g.*, Ameritech, Bell Atlantic, BellSouth, NYNEX, SBC, U S WEST (BOC Coalition) *ex parte* (filed May 9, 1997) at 14; BOC Coalition *ex parte* (filed Aug. 13, 1997) at 11-12.

67 *See, e.g.*, CPI Reply at 7-8; NYNEX Comments at 11.

68 MCI Comments at 3-5; MCI Reply at 4. In addition, BellSouth, GTE, NTCA/OPASTCO, and U S WEST support this approach as an alternative to their first choice, the single category approach. BellSouth Comments at 11-12; GTE Comments at 11-12;

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able to use CPNI obtained from its provision of long distance service to market CMRS, but would not be able to use long distance CPNI to market local service, without customer approval. Fourth, a number of parties urge us to interpret section 222(c)(1)(A) as referring only to one broad telecommunications service that includes all of a carrier's telecommunications service offerings.[69] This approach, which we refer to as the "single category approach," would permit carriers to use CPNI obtained from their provision of any telecommunications service, including local or long distance service as well as CMRS, to market any other telecommunications service offered by the carrier, regardless of whether the customer subscribes to such service from that carrier.

30. Finally, several proponents of the various approaches further argue that we should permit carriers to share CPNI among all offerings and/or service categories subscribed to by the customer from the same carrier.[70] We

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GTE Reply at 2, 4 & n.4; NTCA/OPASTCO Reply at 3; U S WEST Comments at 5, 12-13.

[69] ACTA Comments at 4-5; ALLTEL Comments at 3-4; Ameritech Comments at 3; AT&T Comments at 2-3, 6-11; AT&T Reply at 2-7, 9-10; Bell Atlantic Comments at 2-7; Bell Atlantic Reply at 4-6, att.; BellSouth Comments at 4, 6-10; BellSouth Reply at 4-6; CBT Comments at 3-5; GTE Comments at 10-11; GTE Reply at 1-4; MFS Comments at 3-4; NTCA/OPASTCO Reply at 1-3; SBC Comments at 5-9; SBC Reply at 6-9; USTA Comments at 2-4; USTA Reply at 3-5; U S WEST Comments at 4-6, 10-12; U S WEST Reply at 5 n.18, 7 n.30. *See also* ICG Comments at 5 (single category approach should apply for CLECs, but not ILECs); NYNEX Reply at 4 (supports single category approach as alternative to three category approach).

[70] *See, e.g.*, ACTA Comments at 4; Ameritech Comments at 12; MCI *ex parte* (filed Aug. 15, 1997) at 13-17; SBC

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refer to this concept as the "total service approach" because it allows carriers to use the customer's entire record, derived from the complete service subscribed to from that carrier, for marketing purposes within the existing service relationship. Although parties supporting this concept advance various alternative schemes, we view it as a separate interpretation of section 222(c)(1)(A) that is defined by the customer's service subscription. Under the total service approach, for example, a carrier whose customer subscribes to service that includes a combination of local and CMRS would be able to use CPNI derived from this entire service to market to that customer all related offerings, but not to market long distance service to that customer, because the customer's service excludes any long distance component. Thus, under the total service approach, the carrier's permitted use of CPNI reflects the level of service subscribed to by the customer from the carrier.

2. Discussion.

31. As discussed below, we conclude that the total service approach best protects customer privacy interests, while furthering fair competition, and thereby best comports with the statutory language, history, and structure of section 222.

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Reply at 7 n.22; Sprint Comments at 2-3 (but only for entities without market power); Sprint Reply Comments at 8-10 (same). The Texas Commission and Ad Hoc support a total service approach, although they would permit the sharing of CPNI only between the discrete offerings to which a customer subscribes. Ad Hoc Reply at 5-6; Texas Commission Comments at 8.

V. "APPROVAL" UNDER SECTION 222(c)(1)V

A. Overview

86. Under sections 222(c)(1), (c)(2), and (d)(3), a carrier may (or must) use, disclose, or permit access to CPNI upon the customer's approval. In contrast to sections 222(c)(2) and (d)(3) of the Act, in which Congress made clear the form of customer approval,[71] section 222(c)(1) does not specify what kind of approval is required when it permits a carrier upon "approval of the customer" to use, disclose, or permit access to CPNI for purposes beyond the limited exceptions set forth in sections 222(c)(1)(A) and (B).[72] Because the form of approval has bearing on carriers' use of CPNI as a marketing tool, we received considerable comment concerning the proper interpretation of "approval" under section 222(c)(1). In general, parties offer three

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71 Section 222(c)(2) provides that: "[a] telecommunications carrier shall disclose [CPNI], upon affirmative written request by the customer, to any person designated by the customer." 47 U.S.C. § 222(c)(2). Section 222(d)(3) provides, in pertinent part, that: "[n]othing in [section 222] prohibits a telecommunications carrier from using, disclosing, or permitting access to [CPNI] obtained from its customers, either directly or indirectly through its agents . . . to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service." 47 U.S.C. § 222(d)(3).

72 47 U.S.C. § 222(c)(1). Section 222(c)(1) also permits a carrier to use, disclose, or permit access to CPNI as required by law. 47 U.S.C. § 222(c)(1).

separate views, ranging from a most restrictive interpretation that would require approval to be in writing, to a permissive one, where carriers merely would need to provide customers with a notice of their intent to use CPNI, and a mechanism for customers to "opt-out" from this proposed use (notice and opt-out).[73]

87. We conclude that the term "approval" in section 222(c)(1) is ambiguous because it could permit a variety of interpretations. We resolve that ambiguity by implementing the statute in a manner that will best further consumer privacy interests and competition, as well as the principle of customer control. We conclude that carriers must obtain express written, oral, or electronic approval for CPNI uses beyond those set forth in sections 222(c)(1)(A) and (B). Further, in order to ensure that customers can provide informed approval under section 222(c)(1), we require that carriers give customers explicit notice of their CPNI rights prior to any solicitation for approval. By implementing the approval requirements of section 222(c)(1) in this manner, we will minimize any unwanted or unknowing disclosure of CPNI by customers, consistent with Congress' concern for consumer privacy interests. In addition, as explained below, we determine that this form of approval will minimize the competitive advantages that might otherwise accrue unnecessarily to incumbent carriers.

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[73] A notice and opt-out mechanism also is referred to as a "negative option." We refer to oral, electronic, and written forms of approval collectively as "affirmative" or "express" approval.

B. Express Versus Notice and Opt-Out

1. Background

88. The Commission sought comment in the *Notice* on which methods carriers may use to obtain customer approval consistent with section 222.[74] The Commission recognized that, in the *Computer III* proceedings, prior to the 1996 Act, it established certain authorization requirements applicable solely to the enhanced services operations of AT&T, the BOCs, and GTE, and to the CPE operations of AT&T and the BOCs.[75] Under these *Computer III* rules, for example, the BOCs, AT&T, and GTE are required to provide multi-line business customers with written notification of their right to restrict CPNI use.[76] Absent customer direction to the contrary, we permit these carriers to use their respective CPNI for marketing purposes as proposed in their notice. This notice and opt-out approach does not extend, however, to business customers with twenty or more access lines. For these large business customers, we require the BOCs and GTE to obtain affirmative written authorization before using CPNI to market enhanced services.[77] The Commission

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74 *Notice* at 12526, ¶ 27.

75 *Id.* at 12516, ¶ ¶ 4-5; *Computer III supra* note. We discuss the *Computer III* rules specifically, and eliminate them in favor of the framework established by Congress in section 222, *see* discussion *infra* Part VIII.

76 Customers with two or more access lines are multi-line customers. *Computer III Phase II Order*, 2 FCC Rcd at 3093-97 ¶ ¶ 141-174, *supra* note; *GTE Safeguards Order*, 9 FCC Rcd at 4944-45 ¶ 45, *supra* note.

77 *BOC Safeguards Order*, 6 FCC Rcd at 7605-14 ¶¶ 76-

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invited comment in the *Notice* on whether these *Computer III* requirements should remain in view of section 222.[78]

89. The Commission also sought comment in the *Notice* on a number of alternative methods by which carriers may obtain customer approval under section 222(c)(1). The Commission noted, for example, that carriers may choose a written method, in the form of a letter or billing insert sent to the customer that contains a summary of the customer's CPNI rights and is accompanied by a postcard that the customer could sign and return to the carrier to authorize CPNI use.[79] The Commission sought comment on the privacy and competitive implications, as well as the costs and benefits, of requiring carriers to obtain prior written approval before they could use, disclose, or permit access to customer CPNI.[80]

90. Alternatively, the Commission sought comment on whether section 222(c)(1) allows carriers to engage in outbound telemarketing to obtain oral customer approval for CPNI use.[81] The Commission observed that sections 222(c)(2) and (d)(3) give rise to conflicting inferences as to whether approval can be oral.[82] The Commission noted, for example, that section 222(c)(2)

89, *supra* note; *GTE Safeguards Order*, 9 FCC Rcd at 4944-45 ¶ 45, *supra* note.

78 *Notice* at 12530, ¶ 41.

79 *Id.* at 12527, ¶ 29.

80 *Id.* at 12527, ¶ 31.

81 *Id.* at 12527, ¶ 30.

82 *Id.*

requires telecommunications carriers to disclose CPNI "upon affirmative written request by the customer, to any person designated by the customer," and that the absence of a similar written requirement in section 222(c)(1) suggests that oral approval is permitted under that provision.[83] On the other hand, section 222(d)(3) provides that telecommunications carriers may use, disclose, or permit access to CPNI "to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service."[84] The Commission stated that section 222(d)(3) could be interpreted to suggest that oral consent was not permissible for a broader purpose or a longer duration, or, in the alternative, to allow a carrier to use CPNI to provide a customer with information for the duration of an inbound call, even if the customer has otherwise restricted the carrier's use of CPNI.[85] The Commission sought comment on how section 222(c)(1) should be interpreted in light of these other provisions.[86]

2. Discussion

91. As noted above, while section 222(c)(1) requires customer approval for carrier use of CPNI outside the scope of sections 222(c)(1)(A) and (B), it does not expressly state the form of this approval. In order to implement this provision, we therefore must determine what method of

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83 *Id.*

84 *Id.* at 12527, ¶ 31.

85 *Id.*

86 *Id.*

approval will best further both privacy and competitive interests, while preserving the customer's ability to control dissemination of sensitive information. We conclude, contrary to the position of a number of parties,[87] that an express approval mechanism is the best means to implement this provision because it will minimize any unwanted or unknowing disclosure of CPNI.[88] In addition, such a mechanism will limit the potential for untoward competitive advantages by incumbent carriers. Our conclusion is guided by the natural, common sense understanding of the term "approval," which we believe generally connotes an informed and deliberate response.[89] An express approval

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[87] ALLTEL Comments at 5-6; Ameritech Comments at 9; AT&T Comments at 3; Bell Atlantic Comments at 7; BellSouth Comments at 18; CBT Comments at 8; GTE Comments at 3, 6; NYNEX Comments at 15; PacTel Comments at 5; SBC Comments at 10; USTA Comments at 5; U S WEST Comments at 17-19.

[88] Arch Reply at 4-5; California Commission Reply at 6-7; CompTel Reply at 4-6; CPSR Reply at 10-11; Frontier Comments at 7-8; ITAA Reply at 4, 9-12; LDDS WorldCom Reply at 8; MCI Reply at 8; Sprint Reply at 4-5; TRA Reply at 6, 8, 11-12; Washington Commission Comments at 6-7.

[89] Indeed, a canvass of definitions of "approve" from a variety of sources confirms that the root of the term is "to prove," which connotes an active, affirmative meaning. *See, e.g.*, Webster's New International Dictionary of the English Language 133 (2nd ed. 1934)(1. To demonstrate the truth or correctness of; to establish as the fact or as being sound; to corroborate; to authenticate; 2. To afford proof of, as by active demonstration); Webster's Third New International Dictionary of the English Language Unabridged 106 (1971) (1. To demonstrate the truth or correctness of; establish as fact or as being sound; 2. test, try; 3. to make or show to be worthy of approbation or acceptance; to offer proof of by active demonstration: manifest or display actually or practically; exhibit; 5. to express often formally agreement with and support of or commendation of as meeting a standard); The American

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best ensures such a knowing response. In contrast, under an opt-out approach, as even its proponents admit,[90] because customers may not read their CPNI notices, there is no assurance that any implied consent would be truly informed.[91] We agree with the observations of MCI and Sprint that, insofar as customers may not actually consider CPNI notices under a notice and opt-out approach, they may be unaware of the privacy protections afforded by section 222, and may not understand that they must take affirmative steps to restrict access to sensitive information.[92] We therefore find it difficult to construe a customer's failure to respond to a notice as constituting an informed approval of its contents. Accordingly, we adopt a mechanism of express approval because we find that it is the best means at this time to achieve the goal of ensuring informed customer approval.

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99. Our express approval requirement also is justified by the principles of customer control and convenience that are embodied in section 222.[93] These principles contemplate

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Heritage Dictionary of the English Language (1976) (1. regard favorably; commend by word or action; consider right or good; 2. To confirm or consent to officially; to sanction; ratify).

90 *See, e.g.*, Bell Atlantic Reply at 7; GTE Comments at 5-6, 9.

91 Frontier Comments at 7-8; ITAA Reply at 11-12; MCI Reply at 8; Sprint Reply at 5; *see also* California Commission Comments at 8 (notice and opt-out raises concerns regarding the verification and accuracy of CPNI notices).

92 MCI Reply at 8; Sprint Reply at 5.

93 *See supra* ¶¶ .

that the customer, not the carrier, will decide whether and to what extent CPNI is used. Consistent with these principles, we find that express approval, in contrast to a notice and opt-out approach, best ensures that customers maintain control over carrier use of sensitive CPNI, and that those that wish to limit the use and dissemination of their information will know how, and be able to do so.[94] A market trial conducted by U S WEST supports the view that, when asked, customers more often than not want to limit their carrier's use of their CPNI for purposes beyond the existing service relationship. In its trial, U S WEST attempted to obtain affirmative approval through various means, including inbound and outbound telephone solicitations, as well as through direct mail. In seeking approval from its local service customers, U S WEST generally explained that:

> We're calling all of our customers to ask for their permission to continue to share information about their telephone account services within the *expanding* U S WEST family of product areas. This will allow us to keep on working cooperatively with *other* U S WEST product areas -- like wireless, long distance and the Internet -- to customize product packages to match your individual needs.[95]

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[94] *See* CPI Reply at 4 (while some consumers may find it useful to allow information to be made available to carriers that can provide tailored offerings, others express concern about the availability of information concerning their use of telecommunications).

[95] U S WEST *ex parte* (filed Oct. 8, 1997).

The study generally found that, of those customers even willing to listen to U S WEST's request for approval *(e.g.*, in the outbound telephone solicitation, those that did not hang up or were otherwise not reached), the majority of customers contacted did not approve the carrier's use of their CPNI as proposed by U S WEST.[96] This failure to obtain approval from most customers resulted regardless of whether the solicitation for approval was undertaken by telephone or by mail, or accompanied by financial incentives.[97] For example, the outbound telephone solicitation trial produced a weak response, with more residential customers denying rather than granting approval for CPNI use.[98] Similar results were obtained in response to the direct mail campaign, even when financial inducements were provided.[99]

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96 U S WEST *ex parte* (filed Sept. 9, 1997). Only six to eleven percent of residential customers and five to nine percent of small business customers in U S WEST's direct mail trial approved the use of CPNI for marketing purposes. *Id.* Similarly, only about 28 percent of residential customers in U S WEST's outbound telephone solicitation trial consented to CPNI use. *Id.* at 10. U S WEST was able to secure a 72 percent affirmative response rate in its inbound telephone solicitation trial. *Id.* at 9.

97 *Id.*

98 *Id.* at 10. U S WEST contacted 578 residential customers in its outbound telephone solicitation trial. About 28 percent of these customers granted approval for CPNI use; 33 percent denied approval. *Id.* The remainder of customers sampled represented "hang-ups" or "unworkables," or requested to be placed on a "do-not-call" list. *Id.*

99 U S WEST's direct mail trial was conducted via first class mail to 15,200 individuals, separate from any U S WEST billing, and specifically requested an affirmative response. Some respondents were asked to mail back a form, while others were asked to call a toll-

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* * * *

XI. ORDERING CLAUSES

257. Accordingly, IT IS ORDERED that pursuant to Sections 1, 4(i), 222 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § § 151, 154(i), 222 and 303(r), a REPORT AND ORDER and FURTHER NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

* * * *

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

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free number. Some mailings offered no incentive to respond, while others offered one dollar or five dollar incentives. According to U S WEST, response rates were low, regardless of the specific notification approach and the response media used. As noted above, positive response rates ranged from six to eleven percent for residential customers and from five to nine percent for small business customers. *Id.* at 11.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 98-9518

U.S. WEST, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,

Respondents,

AIRTOUCH COMMUNICATIONS, INC. (AIRTOUCH); SPRINT CORPORATION; AT&T CORPORATION; SBC COMMUNICATIONS, INC. (SBC); SOUTHWESTERN BELL TELEPHONE COMPANY; PACIFIC BELL; NEVADA BELL; MCI TELECOMMUNICATIONS CORPORATION; COMPETITIVE TELECOMMUNICATIONS ASSOCIATION; COMPETITION POLICY INSTITUTE; BELLSOUTH

CORPORATION; FRONTIER CORPORATION,

Intervenors.

SOFTWARE & INFORMATION INDUSTRY ASSOCIATION; THF ELECTRONIC PRIVACY INFORMATION CENTER; THE AMERICAN CIVIL LIBERTIES UNION; THE CENTER FOR MEDIA EDUCATION; COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY; CONSUMER ACTION; CONSUMER FEDERATION OF AMERICA; INTERNATIONAL COMMUNICATIONS ASSOCIATIONS; JUNKBUSTERS; MEDIA ACCESS PROJECT; PRIVACY RIGHTS CLEARINGHOUSE; PRIVATE CITIZEN, INC.; U.S. COLO. AND N.M. PUBLIC INTEREST RESEARCH GROUP; UTILITY CONSUMER ACTION NETWORK; AND 22 LAW PROFESSORS AND PRIVACY SCHOLARS,

Amici Curiae.

ORDER
Filed November 30, 1999

Before **PORFILIO, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO** and **MURPHY,** Circuit Judges*.

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*Chief Judge Seymour is recused in this matter and did not participate in consideration of the rehearing petitions.

The petitions for rehearing are denied by the panel that rendered the decision.

The suggestions for rehearing en banc were transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. A poll was requested and denied by a majority of the judges. Judges, Brorby, Henry, Briscoe, Lucero, and Murphy voted in favor of en banc review.

Entered for the Court
PATRICK FISHER, Clerk of Court
by:

Deputy Clerk

U.S. CONSTITUTION
AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

SEC. 4 [47 U.S.C. 154] PROVISIONS RELATING TO THE COMMISSION.

* * *

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

SEC. 222. [47 U.S.C. 222] PRIVACY OF CUSTOMER INFORMATION.

(a) IN GENERAL.—Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.

(b) CONFIDENTIALITY OF CARRIER INFORMATION.—A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

(c) CONFIDENTIALITY OF CUSTOMER PROPRIETARY NETWORK INFORMATION.—

(1) PRIVACY REQUIREMENTS FOR TELECOMMUNICATIONS CARRIERS.—Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

(2) DISCLOSURE ON REQUEST BY CUSTOMERS.—A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written

request by the customer, to any person designated by the customer.

(3) AGGREGATE CUSTOMER INFORMATION.—A telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service may use, disclose, or permit access to aggregate customer information other than for the purposes described in paragraph (1). A local exchange carrier may use, disclose, or permit access to aggregate customer information other than for purposes described in paragraph (1) only if it provides such aggregate information to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request therefor.

(d) EXCEPTIONS.—Nothing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers, either directly or indirectly through its agents—

(1) to initiate, render, bill, and collect for telecommunications services;

(2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services; or

(3) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service.

(e) SUBSCRIBER LIST INFORMATION.—Notwithstanding subsections (b), (c), and (d), a

telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.

(f) DEFINITIONS.—As used in this section:

(1) CUSTOMER PROPRIETARY NETWORK INFORMATION.—The term "customer proprietary network information" means—

(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier;

except that such term does not include subscriber list information.

(2) AGGREGATE INFORMATION.—The term "aggregate customer information" means collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed.

(3) SUBSCRIBER LIST INFORMATION.—The term "subscriber list information" means any information—

(A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications

are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and

(B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.

SEC. 631. [47 U.S.C. 551] PROTECTION OF SUBSCRIBER PRIVACY.

(a)(1) At the time of entering into an agreement to provide any cable service or other service to a subscriber and at least once a year thereafter, a cable operator shall provide notice in the form of a separate, written statement to such subscriber which clearly and conspicuously informs the subscriber of—

(A) the nature of personally identifiable information collected or to be collected with respect to the subscriber and the nature of the use of such information;

(B)) the nature, frequency, and purpose of any disclosure which may be made of such information, including an identification of the types of persons to whom the disclosure may be made;

(C) the period during which such information will be maintained by the cable operator;

(D) the times and place at which the subscriber may have access to such information in accordance with subsection (d); and

(E) the limitations provided by this section with respect to the collection and disclosure of information by a cable operator and the right of the subscriber under subsections (f) and (h) to enforce such limitations.

In the case of subscribers who have entered into such an agreement before the effective date of this section, such notice shall be provided within 180 days of such date and at least once a year thereafter.

(2) For purposes of this section, other than subsection (h)—

(A) the term "personally identifiable information" does not include any record of aggregate data which does not identify particular persons;

(B) the term "other service" includes any wire or radio communications service provided using any of the facilities of a cable operator that are used in the provision of cable service; and

(C) the term "cable operator" includes, in addition to persons within the definition of cable operator in section 602, any person who (i) is owned or controlled by, or under common ownership or control with, a cable operator, and (ii) provides any wire or radio communications service.

(b)(1) Except as provided in paragraph (2), a cable operator shall not use the cable system to collect personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned.

(2) A cable operator may use the cable system to collect such information in order to—

(A) obtain information necessary to render a cable service or other service provided by the cable operator to the subscriber; or

(B) detect unauthorized reception of cable communications.

(c)(1) Except as provided in paragraph (2), a cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator.

(2) A cable operator may disclose such information if the disclosure is—

(A) necessary to render, or conduct a legitimate business activity related to, a cable service or other service provided by the cable operator to the subscriber;

(B) subject to subsection (h), made pursuant to a court order authorizing such disclosure, if the subscriber is notified of such order by the person to whom the order is directed; or
(C) a disclosure of the names and addresses of subscribers to any cable service or other service, if—
(i) the cable operator has provided the subscriber the opportunity to prohibit or limit such disclosure, and
(ii) the disclosure does not reveal, directly or indirectly, the—
(I) extent of any viewing or other use by the subscriber of a cable service or other service provided by the cable operator, or
(II) the nature of any transaction made by the subscriber over the cable system of the cable operator.
(d) A cable subscriber shall be provided access to all personally identifiable information regarding that subscriber which is collected and maintained by a cable operator. Such information shall be made available to the subscriber at reasonable times and at a convenient place designated by such cable operator. A cable subscriber shall be provided reasonable opportunity to correct any error in such information.
(e) A cable operator shall destroy personally identifiable information if the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under subsection (d) or pursuant to a court order.
(f)(1) Any person aggrieved by any act of a cable operator in violation of this section may bring a civil action in a United States district court.
(2) The court may award—

(A) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation of $1,000, whichever is higher;
(B) punitive damages; and
(C) reasonable attorneys' fees and other litigation costs reasonably incurred.
(3) The remedy provided by this section shall be in addition to any other lawful remedy available to a cable subscriber.
(g) Nothing in this title shall be construed to prohibit any State or any franchising authority from enacting or enforcing laws consistent with this section for the protection of subscriber privacy.
(h) A governmental entity may obtain personally identifiable information concerning a cable subscriber pursuant to a court order only if, in the court proceeding relevant to such court order—
(1) such entity offers clear and convincing evidence that the subject of the information is reasonably suspected of engaging in criminal activity and that the information sought would be material evidence in the case; and
(2) the subject of the information is afforded the opportunity to appear and contest such entity's claim.